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IN THE

SUPREME COURT

OF

WASHINGTON

JANUARY 28, 1911—APRIL 5, 1911

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REPORTER

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OF THE

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CASES

DETERMINED IN THE

SUPREME COURT

OF

WASHINGTON

[No. 8947. Department One. January 28, 1911.]

MICHAEL MYHRA, *Respondent*, v. CHICAGO, MILWAUKEE AND PUGET SOUND RAILWAY COMPANY, *Appellant*.[1]

MASTER AND SERVANT—DEFECTIVE CARS—ASSUMPTION OF RISKS—PROMISE TO REPAIR. There is a sufficient complaint and promise to remedy a defect to relieve a railroad brakeman from the assumption of risks in attempting to give signals from the end doors of a box car, which had neither platforms nor brakes, and the side doors of which were nailed up, where it was obvious that it was not a safe place for giving signals, and the brakeman asked for the removal of the boards on the side doors in order to give "a chance to stay there and give signals and also get out if necessary," whereupon the master's terminal engineer replied that the use of the car was only temporary, that they would hold out the first small box car and "we will fix it up."

SAME—AUTHORITY TO MAKE PROMISE—VICE PRINCIPAL. A railroad employee styled a terminal engineer, having charge of material yards, the loading of cars, and the direction of engineers and conductors, and regarded by the crew as the officer in charge of the train, is a vice principal and has authority to promise to remedy a defect in a car on a complaint made by a brakeman; especially where the car was furnished for particular service in construction work on application made to him by the conductor.

SAME—DEFECTIVE CARS—NEGLIGENCE—QUESTION FOR JURY. A box car without platforms or brakes, with the side doors nailed up, cannot be said, as a matter of law, to be reasonably safe for construction work requiring the giving of signals from the end doors, where cabooses with end platforms and railings or cars with side doors and ladders are commonly used in such work.

[1]Reported in 112 Pac. 939.

SAME—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. A brakeman, compelled to give a signal from the end door of a box car without any platforms, is not guilty of contributory negligence, as a matter of law, in stepping upon the coupler instead of the grab irons, which would have been better and safer, where he and others testified that the coupler gave a firmer and safer foothold.

SAME. In such a case, it cannot be said that he should have given signals from the other end of the car, where there was evidence that that would have been more dangerous, nor from the side windows, when it was doubtful if they could have been opened.

EVIDENCE—EXPERTS—OPINIONS. It is not error to allow physicians, who made an examination of plaintiff's condition, to express opinions based upon subjective symptoms, where they were not permitted to testify to any statements made by the plaintiff or as to any of his acts within the control of his will power.

APPEAL—REVIEW—HARMLESS ERROR—INSTRUCTIONS. In an action for personal injuries, an instruction stating the measure of damages, "even though the amount is for a large sum," while objectionable, is not necessarily prejudicial, where the amount was limited to the sum claimed in the complaint.

DAMAGES—PERSONAL INJURIES—EARNING CAPACITY—PROBABLE PROMOTION. In an action for personal injuries sustained by a railroad trainman, an instruction allowing the jury to consider evidence of the probability of his promotion and a consequent increase of wages is not prejudicial.

TRIAL—INSTRUCTIONS AS A WHOLE. Objection to particular instructions cannot be urged where the instructions as a whole fairly and correctly state the law of the case.

DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for $11,250 for injuries sustained by a railroad brakeman forty-one years of age, in good health, earning $80 to $90 a month, and who had earned $100 to $120 as a conductor, is not excessive, where there was competent evidence that his sexual vigor was impaired and that he will never be able to perform manual labor, and that his body is out of alignment and his injury most serious.

Appeal from a judgment of the superior court for King county, Main, J., entered February 21, 1910, upon the verdict of a jury rendered in favor of the plaintiff for personal injuries sustained by a railway brakeman in a fall from a car. Affirmed.

H. H. Field and *Geo. W. Korte*, for appellant.

Arthur E. Griffin, for respondent.

Gose, J.—The plaintiff brought this action to recover damages for personal injuries sustained while in the service of the defendant. This appeal is prosecuted from a verdict and judgment in plaintiff's favor.

The essential facts are that the respondent, who had had about fifteen years' experience as a railway brakeman and about five years' experience as a railway conductor, sustained a serious injury on the 7th day of December, 1908. At that time he had been employed by the appellant as a brakeman for some four or five weeks. He was injured by falling, or being thrown, from a car while attempting to give the engineer a stop signal.

The train crew consisted of the conductor, engineer, fireman, and one brakeman beside the respondent. They were engaged in hauling material from Seattle to the Puyallup river, for the construction of a bridge at the latter point. The road was being used for construction work only. Flat cars were used for carrying the material. When the accident occurred, the flat cars had been detached and the train, consisting of the engine and one box car, was returning to Sumner for the night. The accident happened near the end of a long trestle, and on a descending grade of about one per cent. The box car was in front of the engine. The train was near the switch, and the respondent had been told by the conductor to give the stop signal at that point, so that the car could be switched and transferred to the rear of the engine. The car had two or three side windows, and a door upon each side and in both ends. The side doors had been closed by nailing 1x12 boards across them. The evidence is conflicting as to whether the windows were closed. There was no platform or railing upon either end of the car. At both ends of the car there was a door sill six or eight inches in width.

The respondent testified that, preparatory to giving the signal, he stepped to the front end of the car with a lantern upon his right arm, took hold of the door casing, put the left foot upon the draw head or coupler, which was some

four or six inches below the door sill, took hold of the grab iron to the right, placed his right foot upon the lower grab iron, and that, in swinging around toward the car, his foot slipped from the grab iron or climber, and he was thrown beneath the car and crushed and mangled by the tender to the engine. The box car had been in use three or four weeks at the time of the accident, and the respondent was familiar with its deficiencies. It had been furnished originally as a sleeping car.

He bases his right to recover upon an alleged promise to substitute a better car. The appellant, upon this branch of the case, makes two principal contentions: (1) It asserts that the evidence does not tend to show the essential elements of a complaint and a promise; and (2) that the promise, if any, was not made by one having authority to represent it in that behalf. The court instructed the jury:

"You are instructed that before the plaintiff can avail himself of any promise in respect to the said car, claimed by him to have been made by the defendant, he must prove by a fair preponderance of the evidence that said car was defective and unsafe for the purposes for which it was being used; that the plaintiff objected to the use of said car and complained to the defendant that his personal safety was in imminent danger; that in pursuance of said complaint the defendant promised plaintiff to substitute said car with a safer car; that plaintiff relied upon said promise, and that said promise was made by an authorized agent of said company."

The respondent further testified that, a short time after he entered the service of the appellant, he had a conversation with a Mr. Osgood, its terminal engineer, in which the respondent suggested to him that the boards should be removed from the side doors so that they could be opened, and "that would give us a chance to stay there and give signals, and also to get out if it was necessary;" that the latter replied that the appellant's use of the car was only temporary; that it did not belong to it, but that "we will hold out the first box car," or that "we [meaning the crew] could hold out the first

small box car—if we saw any small box car come to the coast —hold it out and they would fix it up for a caboose;" that he said, "We will fix it up." Upon cross-examination, the witness further stated that Osgood, the conductor, and himself were in the car when the conversation took place, and that "they were talking about how the car was there and such like."

We have somewhat hesitatingly reached the conclusion that the complaint and the promise fulfill the requirements of the law as defined in the instruction. It is obvious from what has been said that the car when in motion was not a safe place for giving signals. The conversation occurred in the car, between two men experienced in railroading. They both knew that the car had neither platform nor brakes. Osgood knew that the brakeman was the signalman, and that the giving of signals from either end of the car when the car was in motion was dangerous. When the respondent said to him that the removal of the boards and the opening of the door, "would give us a chance to stay there and give signals and also to get out if it was necessary," he knew that the complaint had reference to the hazard incurred by the brakeman in giving signals. The complaint was made on behalf of himself and the other brakeman. It is said that he did not point out the particular peril to be avoided. The jury, however, was warranted in inferring that this was known to Osgood. They were talking about a car the defects of which were well known to them. The jury had a right to infer that the conversation was not altogether without purpose. That which may be reasonably inferred from a fact stated is as legitimate evidence as the statement itself. The respondent testified that he was apprehensive of attempting to signal from the ends of the car, and that he relied upon the promise to substitute another car. We said, in *Alkire v. Myers Lumber Co.*, 57 Wash. 300, 106 Pac. 915, quoting from 1 Labatt, Master & Servant, § 421:

"It is not necessary that the servant shall state in exact words that he apprehends danger to himself by reason of the

defects, nor need there be a formal notification that he will leave the service unless the defect be removed or remedied. It is sufficient if, from the circumstances of the case, it can be fairly inferred that the servant is complaining on his own account, and that he was induced to continue in the service by reason of the promise. It is ordinarily for the jury to say whether the servant's reliance on the promise by the master induced him to continue work."

The true criterion is aptly stated in *Thorpe v. Missouri Pac. R. Co.*, 89 Mo. 650, 2 S. W. 3, 58 Am. Rep. 120, as follows:

"The dependent position of servants generally makes it reasonable to hold any notice on their part sufficient, however timid and hesitating, so long as it plainly conveys to the master the idea that a defect exists, and that they desire its removal. That the real question to be determined in each case is, whether, under all the circumstances, the master had a right to believe and did believe that the servant intended to waive his objections to the unfitness of his fellow-servant or the defect in the materials provided for the work."

See, also, *Rothenberger v. Northwestern Consol. Milling Co.*, 57 Minn. 461, 59 N. W. 531; *Gulf C. & S. F. R. v. Donnelly*, 70 Tex. 371, 8 S. W. 52, 8 Am. St. 608; *Anderson v. Seropian*, 147 Cal. 201, 81 Pac. 521.

In the *Rothenberger* case, it was said that these are questions of fact rather than of law, and consequently for the jury, "at least, if not entirely free from doubt." A review of the cases cited by the appellant would not be profitable. Suffice it to say that they are either based upon facts essentially different from the facts in this case or announce a principle at variance with the view adopted by this court in the *Alkire* case.

The court instructed the jury that the respondent must prove by a preponderance of the evidence that the promise was made by an authorized agent of the appellant. It is stoutly urged that he failed to sustain this burden. The weight of the evidence was, of course, for the jury. The only question for us to determine is whether there is competent evi-

dence to support the verdict in this particular. Upon this phase of the case, we are free from doubt. It is shown that Osgood was styled a terminal engineer. However, he had charge of the material yards, the loading of the cars, and directed the conductor of the train when and where he should take the material. The conductor looked to him for directions, and he was regarded by the entire crew as the officer in charge of the train. Moreover, it was upon the application of the conductor to him that the particular car was furnished at an earlier date. Osgood says that he acted only as an intermediary. However this may be, he got results. He says further that the superintendent and trainmaster controlled the distribution of the cars. The respondent says that the trainmaster furnished the car from which the respondent fell. The trainmaster testified that he did not have authority to secure a coupler for use as evidence. It is significant that the conductor mailed notice of the accident to Osgood. As we said in *State v. Pioneer Ins. Ass'n*, 55 Wash. 51, 104 Pac. 185:

"A corporation can act only through its agents, and they must be held to have such power as inheres in the duties they are assigned to perform."

We think that the jury were warranted in concluding that Osgood's agreement to furnish a better car was a mere incident to the general work in which he was engaged. *Haggard v. Seattle*, 61 Wash. 499, 112 Pac. 503.

It is also urged, that the facts show that the car was reasonably safe for the use to which it was put; that like cars are ordinarily used for construction work; and that the promise to substitute a safer car cannot be made the basis of an action for damages. This view cannot be sustained. There is competent evidence that cabooses with end platforms and railings, or cars with side doors and ladders, are commonly used in construction work.

It is said also that the respondent was guilty of contributory negligence in stepping upon the coupler or draw head.

There is evidence that the safer and better way would have been to have stepped upon the grab irons only. However, the respondent testified that the coupler gave him a firmer and safer foothold, and in this respect he is corroborated by other witnesses. The question of contributory negligence in this respect was therefore for the jury.

It is also contended that the respondent could have given signals from the windows or the other end of the car without incurring danger. There is evidence, however, tending to show that giving a signal from the end of the car next the engine would have been attended with greater danger than the method pursued. It is said, however, that the photographs in the record disprove such evidence. There is abundant evidence that, to have signalled in that way, he would have been required to expose his body between the car and the moving engine, holding to the door casing with one arm and signalling with the other. Whether such method was safe and proper was, under all the evidence, a question for the consideration of the jury. Nor can we rule, as a matter of law, that he should have signalled from the windows. The evidence leaves it doubtful whether the windows could have been opened. Moreover, there is competent evidence tending to show that signals are not given from car windows.

Certain physicians, who examined the respondent at the request of his counsel for the purpose of ascertaining his condition and not for the purpose of treating him, testified to the condition which they found. They admitted that their opinions were based upon both subjective and objective symptoms, as tested by their experience and observation. They were not, however, permitted to testify, either as to the statements made to them by the respondent or as to any of his acts within the control of his will power. It is insisted that it was error to permit them to express an opinion obtained from subjective symptoms. *Chesapeake & O. R. Co. v. Wiley* (Ky), 121 S. W. 402, and *Etzkorn v. Oelwein* (Iowa), 120 N. W. 636, are cited. In the *Wiley* case, the physicians who ex-

amined the injured party, not for the purpose of treatment or advice, were permitted to state in detail the symptoms which he described. They also testified that their information was based upon his statements of his symptoms. It was held that his statements made under such conditions were self-serving, hearsay, and inadmissible, and that opinion evidence founded upon such bases should have been excluded. In the *Etzkorn* case, a witness was permitted to state that the injured party said to her, that "her limbs hurt her; her side hurt her; she felt dizzy." This was held to be hearsay and inadmissible. In both these cases, however, it is said that a witness may testify to involuntary declarations, expressive of present pain and suffering, made within his hearing.

The court instructed the jury:

"If you find from a fair preponderance of the evidence that the plaintiff is entitled to a verdict against the defendant your verdict should be for such a sum as will fully and fairly compensate the plaintiff for the injuries received, as alleged in his complaint and shown by the evidence, even though the amount is for a large sum of money."

The point is pressed that the phrase, "even though the amount is for a large sum," worked prejudice to the appellant. It is said that, "it is the instruction of an advocate and not of a judge." Under our practice, the pleadings are sent to the jury room. The complaint alleges damages in the sum of $24,750. The court had instructed the jury that damages could not be awarded in excess of that sum. While the expression was not a happy one, and its use in such cases is not to be commended, we cannot think it was prejudicial. "Damages," in general legal acceptation, means compensation for the loss incurred or the injury sustained in the given case. This is ordinarily true whether that loss or injury be large or small, and an instruction of this kind would be correct.

The court also instructed the jury:

"If you should find from the evidence that the plaintiff was a trainman of experience and in line for promotion, you have

a right to consider these facts in determining the amount of damages to be awarded to him if you find in his favor."

In criticism of this instruction it is argued that promotion is dependent upon so many and varied contingencies that it left the jury to wander in the field of conjecture and speculation. The testimony on this question, admitted without objection, was as follows:

"Q. What position did you hold with the Columbia & Puget Sound in regard to being in line for promotion? A. When I came back from the north, I got back as brakeman and was told that I would get the first train they had a chance to give me. I would get the run when my turn came. Q. What did you know as to whether or not there were others ahead of you in service entitled to promotion before you were, upon the Columbia & Puget Sound? A. I believe there was one or two men ahead of me that I had to wait for."

In *Richmond and Danville R. Co. v. Elliott*, 149 U. S. 266, cited by the appellant, the plaintiff was permitted to give evidence in respect to what he thought as to the probability of his promotion and a consequent increase of wages to a stated amount. In condemning that character of testimony as creating a problematical and uncertain basis for damages, it was said:

"Of course, there are possibilities and probabilities before every person, particularly a young man, and a jury in estimating the damages sustained will doubtless always give weight to those general probabilities, as well as to those springing from any peculiar capacities or faculties."

We do not think there was any error in the instruction.

There are many other criticisms of the court's instructions which we cannot discuss without an undue extension of the opinion. Suffice it to say that they are technical, and merely attack the phraseology of the whole or some part of a particular instruction. We have repeatedly held that, if the instructions as a whole fairly and correctly state the law of the case, there is no error. The instructions cover some twenty-three typewritten pages. It follows that there are needless

repetitions and minor inaccuracies. The issues in cases of this character are usually few and simple, and it would seem that the jury would have a better understanding of the law of the case if they were less elaborately instructed.

There was a verdict for $11,250, which the trial court declined to reduce. It is finally insisted that the damages awarded are excessive. The respondent was forty-one years of age and robust at the time of the injury. His life expectancy was 27.45 years. His earnings as a brakeman were from $80 to $90 a month. As a conductor he had earned $100 to $120 a month. There is competent testimony that his sexual vigor is impaired, and that he will never be able to perform manual labor. There is a sharp conflict in the evidence as to his ability to work at some time in the future. Some of the physicians expressed the belief that there will be a practical recovery, whilst the physicians who testified for the appellant gave it as their opinion that he will never be able to work. The trial began more than a year after the injury occurred, and continued for five days. The respondent at all times sits and walks with his body drawn to one side. The appellant insists that the position is simulated. Both the jury and the trial court had ample opportunity to observe him, and it is apparent that they were of the opinion that his body was out of alignment and his injury most serious.

While the judgment is large, it is within the evidence, and will be affirmed.

Rudkin, Fullerton, Mount, and Parker, JJ., concur.

[No. 8826. Department One. January 28, 1911.]

HULDAH A. SHEPPARD, *Appellant*, v. COEUR D'ALENE LUMBER COMPANY, LIMITED, *et al.*, *Respondents*.[1]

EVIDENCE — FOREIGN LAWS — PRESUMPTIONS. Laws of another state are presumed to be the same as our own, in the absence of pleading or proof.

VENUE—TITLE TO REAL PROPERTY—USE AND OCCUPATION. An action under Rem. & Bal. Code, § 8805, for the recovery of reasonable rent from a tenant by sufferance, is not an action affecting the title to real property, within Id., § 204, laying the venue in the county where the same is situated, although the answer sets up title in the defendants and brings the title incidentally in issue.

LANDLORD AND TENANT—RENTS—ACTIONS—STATUTES—TENANT BY SUFFERANCE. Rem. & Bal. Code, § 8805, authorizing an action to recover reasonable rents from a tenant by sufferance, changes the common law rule that such rent is not recoverable, and the action lies against one claiming an adverse title, where the possession was not adverse and hostile in the beginning, but was obtained under an express written contract.

CHADWICK and MOUNT, JJ., dissent.

Appeal from a judgment of the superior court for Spokane county, Hinkle, J., entered January 6, 1910, granting a nonsuit, in an action to recover rents. Reversed.

H. N. Martin, H. P. Knight, O. C. Moore, and *Richard G. Hutchinson*, for appellant.

R. E. McFarland and *Wakefield & Witherspoon (A. C. Shaw*, of counsel), for respondents.

GOSE, J.—This is a suit to recover rent for the use and occupation of real estate, situate in the state of Idaho. At the close of plaintiff's case, a judgment of nonsuit was entered, and she has appealed.

It is alleged that, for some time prior to October, 1903, the respondent corporation, limited, occupied the premises

[1]Reported in 112 Pac. 932.

under a lease which expired on that day; that it continued to occupy the premises until the 19th day of February, 1904, and that the other respondent has since occupied and been in possession of the premises; and that the two respondents, while differing in name, "are identical in interest," and that the stock of the two corporations, "is owned and the business affairs and the management thereof are under the direction and control of the same persons."

The respondent Coeur d'Alene Lumber Company pleads affirmatively that, for more than ten years last past, it and its predecessors in interest have owned the premises in fee simple, and have been and continue "in open, notorious possession" thereof, and have paid the taxes levied thereon by the county in which it is situated. This was put in issue by the reply. At the trial it was shown by documentary evidence that the respondents have been adjudged to be trespassers upon the land, by a judgment entered in the district court of the first judicial district of Idaho, and that the judgment has been affirmed by the supreme court of that state. The appellant bases her right to recover upon Rem. & Bal. Code, § 8805, which provides:

"Whenever any person obtains possession of premises without the consent of the owner or other person having the right to give said possession, he shall be deemed a tenant by sufferance merely, and shall be liable to pay reasonable rent for the actual time he occupied the premises, and shall forthwith on demand surrender his said possession to the owner or person who had the right of possession before said entry, and all his right to possession of said premises shall terminate immediately upon said demand."

In the absence of pleading and proof that the laws of the state of Idaho are different from the laws of this state, they will be presumed to be the same. *Gunderson v. Gunderson*, 25 Wash. 459, 65 Pac. 791.

The judgment of nonsuit was entered on the ground that the action is one "affecting the title" to real property, and that the court was without jurisdiction. This is the only

question presented for our determination. Rem. & Bal. Code, § 204, provides that actions "for the recovery of, for the possession of, for the partition of, for the foreclosure of a mortgage on, or for the determination of all questions affecting the title or for any injuries to real property," shall be commenced in the county in which the subject of the action, or some part thereof, is situated. We do not think the action affects the title to the property within the meaning of the statute. The purpose of the action is to recover a money judgment for the reasonable rental value of the property. In other words, the action is for the breach of an implied contract. Under the averments of the complaint, the respondents are tenants by sufferance and liable for the reasonable rental value. The fact that the answer sets up title in the respondent, and brings the title incidentally into issue, does not make the action a local one. It is not sought to obtain a judgment which will in any manner affect title. That question must be left to the courts of the forum *rei sitae*. If a suit was brought in the courts of this state upon a promissory note, and the answer alleged that the consideration for the note was the sale and conveyance of real property in another county or state, and that there was no title to the property conveyed, a like question would be presented. Obviously such an action would be transitory. This view, we think, is supported by the authorities. *Henwood v. Cheeseman*, 3 Serg. & R. (Pa.) 500; *Menominee River Lumber Co. v. Philbrook*, 78 Wis. 142, 47 N. W. 188; *Hogg v. Mack*, 53 Hun 463; *Nichols v. Voorhis*, 74 N. Y. 28; *Schroeder v. Wittram*, 66 Cal. 636; *Smith v. Schlink*, 6 Colo. App. 228; 12 Ency. Plead. & Prac. 852; 2 Taylor, Landlord & Tenant (8th ed.), 625; *Morgan v. Bell*, 3 Wash. 554, 28 Pac. 925, 16 L. R. A. 614; *State ex rel. Scougale v. Superior Court*, 55 Wash. 328, 104 Pac. 607.

In the *Henwood* case, it was held that the courts of Pennsylvania had jurisdiction of an action of assumpsit for the use and occupation of land lying in the state of New Jersey; that

the action was founded on privity of contract, not privity of estate, and that, "when the title is incidental the court possessing jurisdiction of the contract which is in its nature transitory, may even inquire into the very title let the lands lie where they may." The *Menominee* case was an action for the unlawful detention of premises after the expiration of the lease. The action was commenced before a justice of the peace. The defendant pleaded facts showing that it was the owner of the equitable title to the property. It was held that, if the facts stated in the answer were true, the defendant was the equitable owner of the premises, and that the relation of landlord and tenant did not exist between the parties, but that the title to the land was not involved within the meaning of the statute. The *Hogg* case was an action to recover money paid on a written agreement for the purchase of real estate. The complaint alleged that the defendant agreed to convey the premises in fee simple free from all incumbrances, but that owing to certain defects and incumbrances, the defendant could not convey a good and clear title as he had agreed to do. The defense was that the defendant had a good title and was ready to convey it to the plaintiff. The action was not brought in the county where the land was situated, and it was contended that, under the New York statute, which is similar to ours, the action was local. It was held that the real purpose of the suit was to recover a judgment for money, and that the fact that the question of title to real estate may have to be passed upon in a suit does not make it imperative that the case should be tried in the county where the property is situated. The *Schroeder* case arose out of a similar state of facts. It was there held that the jurisdiction of the justice court was not ousted by the fact that the title to the land was incidentally called in question. The *Nichols* case was an action to have it adjudged that an assessment which was an apparent lien upon real property was not such in fact. It was held that it did not affect the title or an interest in real estate; that the mere fact that the action relates to real prop-

erty, or in some way affects it, does not raise a jurisdictional question. It was said that, whether the assessment was held valid or invalid, would in no way affect the title. In the *Morgan* case, it was held that an action for the specific performance of a contract to convey real estate is a transitory action, and that "it would not determine any question affecting the title in the sense in which the word title is evidently employed in the statute." In *State ex rel. Scougale v. Superior Court, supra*, it was held that an action to impress a trust on real estate is not a local action within the meaning of the statutory provision we have quoted.

The respondents have cited a line of authorities which hold that actions for injuries to real property must be brought in the forum *rei sitae*. Our statute expressly so provides. They further contend that an action to recover rent will not lie against one who is claiming an adverse title, and cite *Pico v. Phelan*, 77 Cal. 86, 19 Pac. 186, and *Fender v. Rogers*, 97 Ill. App. 280. These cases announce the rule that an action for use and occupation does not lie where possession from the beginning was adverse and hostile to the owner. They proceed from the common law principle that rent is not recoverable of a tenant by sufferance. Wood, Landlord & Tenant, § 11; Taylor, Landlord & Tenant (8th ed.), § 21. In the case at bar, the possession was not hostile in the beginning, but as the complaint avers was obtained by an express written contract. Moreover, it was competent for the legislature to change the common-law rule and require the party in possession to attorn to the actual owner of the property. We think the section we have quoted has accomplished that purpose. It is true that the statute permits a recovery of rent for use and occupation where possession has been obtained without the consent of the owner, while another statute is running in favor of the occupant which, if continued for a sufficient length of time, would ripen into title. While there is an inconsistency in the two statutes, neither trenches upon the power vested in another branch of the government. The authorities

are not in entire harmony, but we think the better rule is that the action is transitory.

It follows that the learned trial court erred in granting the nonsuit. The judgment is reversed.

PARKER and FULLERTON, JJ., concur.

CHADWICK, J. (dissenting)—The plaintiff is the widow of one Tony A. Tubbs, who homesteaded the present site of Coeur d'Alene City, in Kootenai county, Idaho. She became, by the death of her husband, the owner of certain property fronting on Lake Coeur d'Alene. A particular description of the property is not material. The waters in front of this property, for some time prior to December 23, 1903, were occupied as a booming and sorting ground by the Coeur d'Alene Lumber Company, Limited. I shall refer to that company hereafter as the "Limited Company." During its occupancy of the property, it deposited some sawdust and waste and piled lumber on the upland, and built a road over or around the tract near the water's edge. After February, 1904, the ground and abutting waters used by the Coeur d'Alene Lumber Company, an independent company, which bought out and took over the mill and business of the Limited Company, and which I shall refer to as the "Lumber Company." There is nothing in the record to show that these companies ever had anything in common, or that the Lumber Company ever at any time assumed the contracts or acknowledged any liability for the torts of the Limited Company. It is not shown, nor is it attempted to be shown, that either of the defendants ever had a lease of the property. The only testimony upon the subject of leases is in the cross-examination of the plaintiff, where she finally says:

"Q. Did you give a lease to the Coeur d'Alene Lumber Company? A. No. They absolutely took possession of the land. Q. Did you give any lease to the Coeur d'Alene Lumber Company, the Idaho corporation [which is the Limited Company]? A. No, I did not. They took possession of the land."

This action was begun in June, 1906, plaintiff alleging that:

"(5) That for some time prior to the first day of October, 1903, defendant Coeur d'Alene Lumber Company, Limited, occupied said described premises, the shore line and lake front thereof, under and by virtue of a lease therefor. That said lease expired on the first day of October, 1903, but that said defendant, Coeur d'Alene Lumber Company, Limited, did not thereupon surrender said premises or remove therefrom, though often requested so to do, but on the other hand continued in the open, acknowledged and exclusive possession and occupancy thereof at all times prior to the 19th day of February, 1904, piling and stacking lumber and dumping and depositing saw dust and other refuse thereon, also floating, anchoring and collecting large numbers of logs in the lake and along the shore line of said premises, throughout the entire length thereof, thereby fully and completely blocking all means of ingress and egress to and from said premises by means of the waters of said lake.

"(6) That defendant Coeur d'Alene Lumber Company was organized as aforesaid, on or about the 19th day of February, 1904, and claims to have thereupon succeeded to all the rights and privileges, likewise to have assumed all liabilities of said Coeur d'Alene Lumber Company, Limited; the occupancy and use, however, of said described premises has at all times continued in the manner above alleged without interruption, and plaintiff therefore alleges that said premises have been occupied and used in the manner aforesaid at all times since about the 19th day of February, 1904, and are now so occupied and used by the said defendant, Coeur d'Alene Lumber Company.

"(7) That at all times since the first day of October, 1903, said described premises have been and now are of the reasonable rental value of $150 per month, no part of which has been paid, though demand therefor has often been made by the plaintiff and refused by said defendants."

The complaint was held good on demurrer because of these allegations, it there appearing that the only controversy was as to the reasonable value of the use of the property, which in its nature is a transitory action and maintainable in the courts of this state. Defendants denied all of the allegations of the

complaint, and in addition set up title in the Lumber Company, acquired through an open and notorious possession running over a period of ten years, during which time it and its predecessors had paid all taxes levied upon the property in the county of Kootenai, state of Idaho. The case went to trial upon these issues. As I have said, no attempt was made to prove a lease to either the Limited Company or the Lumber Company, the testimony showing that the Lumber Company, the present occupant of the land, was a trespasser. In fact, plaintiff's case was prosecuted on the trial upon the theory of tort, and not of contract, and to sustain its theory findings and judgment which had been made and entered in the district court of the state of Idaho, in a case prosecuted by plaintiff against the defendants involving the same property, were offered and received in evidence.

In the Idaho case the court found that plaintiff was the owner of the property; that the defendants were trespassers upon the land to the great damage, loss, and inconvenience of the plaintiff, and that unless restrained would continue to use the property to her great and irreparable damage; and a judgment declaring defendants to be trespassers and perpetually enjoining them from continuing the use and occupation of the property was rendered by the Idaho court. Other testimony was offered tending in some slight degree to show that the reasonable rental value of the property was $150 per month. When defendants rested, plaintiff demurred to the evidence. After argument of counsel the trial judge excused the jury, and directed a judgment without prejudice, or of nonsuit, in favor of defendants.

The judgment rests upon two grounds: insufficiency of the evidence to sustain the judgment; and that, under the evidence, the action was local to the courts of Idaho, and not transitory as contended by plaintiff. It is a rule of primary quality that, "when an action is founded on the privity of the estate and not on contract, it is local and must be brought in the county where the land lies." Taylor, Landlord & Tenant

(9th ed.), vol. 2, § 625. To defeat this rule and maintain her action in the courts of this state, plaintiff has verified and filed a sufficient complaint, but has made no pretense of sustaining it by her proofs. The first and possibly the only question before us then is, is the jurisdiction of our courts to be determined, as against a demurrer to the testimony, by reference to the complaint alone; or does the right to maintain the action depend upon the proofs offered in support of the complaint. The majority of the court has resolved that it shall be measured by the allegations of the complaint. Beyond this instrument, it has not seen fit to go. It has taken no concern of, but on the contrary has shut its eyes to, the evidence. In this view I cannot concur. The true rule was declared by the trial judge. In passing upon the motion for judgment, he held that it would be impossible for him to submit the case under the issues made by the pleadings and the evidence, without requiring the jury to find the ownership and title to the property, that being the first question of fact to be decided. The statute fixing the venue in such cases, Rem. & Bal. Code, § 204, is as follows:

"Actions for the following causes shall be commenced in the county in which the subject of the action, or some part thereof, is situated:

"1. For the recovery of, for the possession of, for the partition of, for the foreclosure of a mortgage on, or for the determination of all questions affecting the title or for any injuries to real property."

The situation is simply this: Plaintiff has recovered a judgment in the Idaho courts, establishing a trespass. With it she has come into our courts and set up a false issue in order to pass a demurrer; and, under pretense of recovering rent, seeks the damages which the Idaho court held that she had suffered but which it did not measure, but which she might have recovered, or at least prayed for, in the foreign action. It is an evasion of the law and an abuse of the rules of state comity. Intraterritorial jurisdiction is sustained under the

doctrine of comity, and not as a matter of right. Therefore, when it appeared that appellant had established a trespass upon her property in the Idaho courts, and waived the incidental damages, the courts of this state should not give ear to her accessory action. The incident should follow the principal action. It cannot be set up as an independent right of action in a foreign court, without violating the rule of comity upon which the right to invoke the jurisdiction of our courts rests. To illustrate: Assuming the law of Idaho to be the same as our own, appellant could not maintain her present action in that state. She would be barred under the doctrine of *res judicata*. Having then no action or right of action in Idaho, she would have none here, although her proofs were otherwise sufficient.

The rule differentiating a local from a transitory action is reduced to its essence by the writer of the opinion in *McGonigle v. Atchison*, 33 Kan. 726, 7 Pac. 550:

"The distinction between transitory and local actions, both at common law and under the code, is generally and substantially as follows: If the cause of action is one that might have arisen anywhere, then it is transitory; but if it is one that could only have arisen in one place, then it is local. Hence actions for injuries to real estate are generally local, and can be brought only where the real estate is situated; while actions for injuries to persons or to personal property, or relating thereto, are generally transitory, and may be brought in any county where the wrongdoer may be found."

This case is quoted by the editor of the Ency. Plead. & Prac., vol. 22, page 776, who also quotes from *Oliver v. Loye*, 59 Miss. 320, as follows:

"It is the settled doctrine in England and America at common law that no *local* action can be maintained out of the jurisdiction in which it arose, and although this is, in many instances, to deprive a party of all remedy, the rule is said to be peremptory and inflexible. Accordingly, it has been repeatedly held, that trespass for injuries to land in one country or state cannot be maintained in another, and that no recovery can be had on a covenant running with land by an assignee of

the covenantee, except in the state where the land lies, even when the covenantor resides elsewhere."

Overwhelming authority is there cited to sustain the text that actions to "recover for injuries done to real property" are local.

A tenancy is never initiated in trespass.

"To create the relation of landlord and tenant, an agreement, either express or implied, must exist. Neither appears from the facts in this case. All the authorities establish the principle that where a person occupies the land of another, not as a tenant but adversely, or where the circumstances under which he enters show that he does not recognize the owner as his landlord, this form of action will not lie. *(Pico v. Phelan,* 77 Cal. 86.)" *Dixon v. Ahern,* 21 Nev. 65, 24 Pac. 337.

The action brought in the courts of this state is the same identical action that was brought in the Idaho courts. The one was in equity. This is a legal action. But both sound in tort, and whether the relief be injunctive or by way of damages, the trespass must be proven in either case. Under all authority, the action of trespass is held to be local, and the damage following the trespass is of the same class. And although it may be held that a plaintiff may split his cause of action, he cannot try out the principal action in the local forum and put his action for damages on wheels under the guise of recovering rents.

"But there must be a test by which it may be determined whether a particular cause of action sounding in damages is local or transitory; and an unerring one inheres in the nature of the *subject* of the injury as differing from the *means* whereby and the mere *place* at which the injury is inflicted. If the subject of the injury be real estate or an easement such as a right of way, whether private or public, obviously the action must be local, for the reason that the injury *to* that particular real estate or easement could not possibly have arisen anywhere else than where the thing injured was actually situated." *Gunther v. Dranbauer,* 86 Md. 1, 38 Atl. 33.

The vice of the majority opinion lies in this: it permits an appellant to invoke jurisdiction of our state courts by the tender of a feigned issue, submit her proof of title by showing a judgment for trespass, and thereupon enter a judgment upon the theory that title it not involved, although without proof of it the action would have failed. A case directly in point is that of *Ellenwood v. Marietta Chair Co.*, 158 U. S. 105. There an action was brought in the state of Ohio, setting up a trespass to real property in the state of Virginia and the removal and conversion of a large quantity of timber. The court said:

"By the law of England, and of those states of the Union whose jurisprudence is based upon the common law, an action for trespass upon land, like an action to recover the title or the possession of land itself, is a local action, and can only be brought within the state in which the land lies. . . . . But the petition, as amended by the plaintiff, on motion of the defendant, and by order and leave of the court, contained a single count, alleging a continuing trespass upon the land by the defendant, through its agents, and its cutting and conversion of timber growing thereon. This allegation was of a single cause of action, in which the trespass upon the land was the principal thing, and the conversion of the timber was incidental only; and could not, therefore, be maintained by proof of the conversion of personal property, without also proving the trespass upon real estate. *Cotton v. United States*, 11 How. 229; *Eames v. Prentice*, 8 Cush. 337; *Howard v. Willson*, 1 Denio, 181; *Dodge v. Colby*, 108 N. Y. 445; *Merriman v. McCormick Co.*, 86 Wis. 142. The entire cause of action was local. The land alleged to have been trespassed upon being in West Virginia, the action could not be maintained in Ohio. The circuit court of the United States, sitting in Ohio, had no jurisdiction of the cause of action, and for this reason, if for no other, rightly ordered the case to be stricken from its docket, although no question of jurisdiction had been made by demurrer or plea."

Reference to that case will show that the sole object of the action was to recover the value of the timber which it was alleged had been removed and converted, the ownership of

which could not be proved without proving title to the real property from which it had been removed.

The writer of the majority opinion has met the moot case made by the complaint, but has wholly misapplied the statute, Rem. & Bal. Code, § 8805. Granting, but not admitting, that a trespass can be converted into a tenancy at sufferance at the will of the owner of real property, and that the laws of Idaho are the same as the law in this state, the appellant is in no position to urge that theory, for she voluntarily abandoned the theory of contract in the Idaho suit, and grounded her action in tort. It is upon that judgment that her rights now depend. She has waived the benefit of the statute if it be applicable. But the statute cannot apply in any event; it can only be invoked where there is no assertion of title in the defendant, or the facts imply the relation of landlord and tenant. Any other construction would deprive a defendant, as the majority would in this case, of the defense of title altogether, and bind him by the foreign judgment, which was admittedly introduced to show title and not to establish a tenancy. Tenancy by sufferance is not an elastic cloak to be thrown over every invasion of right in real property, but from the nature of the term implies a contract relation of landlord and tenant. In *Meyer v. Beyer*, 43 Wash. 368, 86 Pac. 661, a somewhat similar question was noticed by this court.

"Appellants urge that, inasmuch as Meyer obtained the legal title and respondent remained in possession of the premises thereafter, it must be presumed that she did so with his permission, and that she became, by operation of law, a tenant by sufferance whose tenancy appellants could terminate by an action for unlawful detainer as prosecuted herein. It is possible, although we do not pass upon the question, that this contention could be upheld if there were no claim or show of ownership, right or equity in the property by respondent;"

indicating that it was the idea of the court at that time that a tenancy by sufferance depended upon contract, express or implied, and could not be established by operation of law from mere occupancy under a hostile claim.

Section 8805 cannot be construed as it has been by the majority without doing violence to other sections of the statute, as well as to its own terms. Not only would other sections, in reference to the law of ejectment, forcible entry and detainer, trespass, and waste, become dead letters, but the measure of damage in all cases would be the reasonable rental value of the property. For the statute does not make its favor optional with the owner; it creates a legal condition available to owner and tenant alike, in that it says, "without the consent of the owner," implying that it is only applicable where the possession is an issue and the ownership is admitted. Moreover, the intent of the statute is plain when viewed in the light of the common law rule which it obviously intended to supplement with a remedy unknown and unavailing in the common law courts. That suit will not lie to recover rents from a tenant at sufferance is so familiar to every lawyer as to be platitudinous in its character; and that rent can only be recovered when the remedy is sanctioned by some statute is equally well understood. 24 Cyc. 1042; 18 Am. & Eng. Ency. Law (2d ed.), 180. Therefore, the statute was enacted to cure an omission in the law, and is not *sui generis*, as the opinion of the majority would imply.

The case of *State ex rel. Scougale v. Superior Court*, 55 Wash. 328, 104 Pac. 607, 133 Am. St. 1030, and other Washington cases not noted in the majority opinion, are relied on by appellant. It will require no more than a mere reference to this case to show that it, as well as the other Washington cases cited therein, is in line with that current of authority holding that an action brought to establish a trust, whether in real or personal property, is transitory. This jurisdiction is distinct and dependent upon other principles not necessary to notice here. If it be of interest, the authorities are collected and may be found in 22 Ency. Plead. & Prac., p. 140.

I have discussed the question raised by the majority opinion; but, as I have said, the motion for a nonsuit included failure of proof as a ground for dismissal. The judgment

might be affirmed on that ground alone. The judgment of the Idaho court is, in my opinion, insufficient to prove title in appellant. Respondents may have been trespassers at the time it was rendered, but it does not follow that the title to the property was then or is now in appellant.

An apology is due for the inordinate length of this opinion, but I feel that a departure from accepted and established rules of law and practice should not be made by this court without some assurance that the question has been fully considered and that the departure is deliberate.

The judgment of the lower court is in accord with, not only the weight of authority, but all authority, and should be affirmed.

MOUNT, J., concurs with CHADWICK, J.

[No. 9269. Department Two. January 31, 1911.]

IDA M. PEASE *et al.*, *Respondents*, v. W. E. CLAYTON *et al.*, *Appellants.*[1]

APPEAL—RECORD—NECESSITY. Error assigned on overruling a demurrer to a complaint cannot be considered on appeal where the demurrer is not in the record.

APPEAL — PRESERVATION OF GROUNDS — EXCEPTIONS. One general exception to findings and conclusions is insufficient to secure a review of the evidence.

SAME. Error cannot be assigned on denying a new trial where the motion was based upon the record and evidence and no adequate exceptions preserved.

Appeal from a judgment of the superior court for Pierce county, Shackleford, J., entered March 26, 1910, upon findings in favor of the plaintiffs, in an action on contract, after a trial before the court without a jury. Affirmed.

E. D. Wilcox and *Wesley Lloyd*, for appellants.

R. F. Laffoon, for respondents.

[1]Reported in 112 Pac. 943.

PER CURIAM.—Respondents brought this action to recover under a clause in a building contract providing for recovery against appellants in case respondents should be compelled to pay any sum in "discharging any lien on said premises made obligatory in consequence of said contractors' default." Issue being taken upon the complaint alleging payments because of such default, trial was had, resulting in judgment against appellants in the sum of $500, from which they appeal.

The errors assigned are, the overruling of a demurrer to the complaint, errors in the admission of evidence, in rendering judgment for respondents, and in denying a motion for a new trial. We find no such demurrer in the record, and hence cannot review the complaint upon that assignment. Upon the trial the court below made findings of fact and conclusions of law, upon which judgment was entered. The only exception appearing to these findings is at the conclusion thereof, "to all of which the defendants except, and their exceptions are allowed." These are general exceptions and it has been the rule of this court, ever since its first announcement in *Hannegan v. Roth*, 12 Wash. 65, 40 Pac. 636, that such exceptions are not available for any purpose, and that the only question reviewable by this court in such cases is, do the findings support the judgment. *Fender v. McDonald*, 54 Wash. 130, 102 Pac. 1026, where the cases so holding are collected and cited. The findings before us are ample to support the judgment, and the exceptions to the judgment must be overruled.

Since no adequate exceptions have been taken to the findings, the alleged errors in the admission of evidence cannot be reviewed, the findings being taken as correct and justified by proper evidence. For the same reasons the ruling upon the motion for a new trial is not reviewable here, such motion, while containing all the statutory grounds, being based upon the records and evidence taken at the trial and no adequate or proper exception preserved.

The judgment is therefore affirmed.

[No. 9233. Department Two. February 1, 1911.]

MATT HEMMINGSON, *Respondent*, v. CARBON HILL COAL COMPANY, *Appellant*.[1]

MASTER AND SERVANT—SAFE PLACE—TUNNELS — ASSUMPTION OF RISKS—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. The questions of contributory negligence and assumption of risks by a miner injured through the fall of rock while assisting to timber a tunnel are for the jury, where the foreman inspected the place and ordered the plaintiff to work there, and there was some evidence that it was customary for miners engaged in timbering to sound the rock and make some inspection for themselves.

SAME—COAL MINING—STATUTES—APPLICATION. Rem. & Bal. Code, § 7394, providing that the owner shall send down into the mine to be delivered at the working place sufficient timbers and props, in the act on the subject of "coal mines," relating particularly to the extra hazards of that business, has no application to prospecting tunnels in which no coal was being mined and which was not a part of a coal mine; the language indicating that the legislature had in mind the extra hazards peculiar to coal mining (DUNBAR, C. J., dissenting).

APPEAL—REVIEW—INSTRUCTIONS—TRIAL—HARMLESS ERROR. Upon a general verdict, the erroneous submission of the case upon the coal mining statute is not harmless, and a new trial is necessary, although there was sufficient evidence to go to the jury upon the common law liability.

MASTER AND SERVANT—SAFE PLACE—ASSUMPTION OF RISKS—INSPECTION—EVIDENCE OF CUSTOM. Where the character of tunnel work is constantly changing, in the absence of rules promulgated by the master or fixed by law, evidence is admissible of a custom of miners engaged in timbering to test and inspect the roof for themselves, regardless of a test made by the tunnel boss some time before the accident.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered May 2, 1910, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a miner through the fall of overhead rock. Reversed.

[1]Reported in 112 Pac. 1111.

James M. Ashton and *Huffer, Hayden & Hamilton*, for appellant.

Bates, Peer & Peterson, for respondent.

CHADWICK, J.—In January, 1910, the appellant was engaged in running a rock tunnel at its Carbon Hill coal mine. The tunnel was at that time about 1,600 feet long, and was in all respects the ordinary exploring or discovery tunnel, driven by miners with a hope or expectation of catching or cutting a deposit or ledge at depth. It ran through a formation of sandstone, and was timbered as the formation demanded. If the formation was faulty or soft or was passing through slips, it was timbered. If the formation was hard so as to sustain itself, no timbering was put in. The greater part of the tunnel had been timbered, a work in which the shift of which respondent was one was engaged at the time he was injured. The timbering consisted of setting in uprights, sixteen to eighteen inches in diameter, across the top of which a timber called a collar was placed. The uprights and collar were called a set. These sets were placed about five feet apart, and lagging was run from frame to frame on the rock side and top. It had been the general custom to set these frames and put in the lagging after each shot which would, with the drills and methods used at the mine, tear down about six feet of rock. A progress of about six feet in twenty-four hours was usually made, and eight or nine frames would be put up in seven days, if the formation was such as to require timbering. It was customary where the rock was soft and inclined to fall, to put splits or forepoles over the last collar, and wedge them up so as to support the roof while the permanent timbering was being put in.

At the time of the accident complained of, the tunnel had been carried a distance of about eleven feet beyond the last frame, the roof being, in the judgment of the tunnel boss, sufficient to sustain itself. A crew consisted of the machine man and helper and two muckers. When the crew of which

the respondent was the helper went to work, at seven o'clock on January 8, the tunnel boss made some inspection of the roof, the character and extent of which is a disputed fact; and he then ordered the men to clear out the muck or rubbish and set the frames in the space between the last set and the face of the tunnel. Respondent was engaged in making a hitch or depression in which to set one of the uprights, when a rock fell from the roof and cut his leg. He was taken to the local hospital, where his wound was temporarily dressed, and thereafter to a hospital at Tacoma where he was confined for about five weeks while his wound was healing.

The negligence alleged is that appellant put respondent to work in an unsafe place, failed to perform its duty of inspection, and failed to supply sufficient or proper timbers for temporary support of the roof, so as to make the place safe while permanent timbers were being put in. The defense is assumption of risk, contributory negligence, and failure on the part of respondent to follow a custom prevailing among miners engaged in making an unsafe place safe, to inspect by sounding and testing the rock for themselves and following their own judgment.

We think the facts are such as to warrant the submission of the case to the jury upon the general issues of assumption of risk and contributory negligence, and that the motions for nonsuit and directed verdict were properly overruled. *Starck v. Washington Union Coal Co.*, 61 Wash. 213, 112 Pac. 235. But we are nevertheless constrained to hold that the case was submitted to the jury upon a wrong theory of the law, and that a new trial must be granted.

The court assumed that chapter 3 of title LIX, Rem. & Bal. Code, in which it is provided (§ 7394) that the owner of a coal mine,

"shall keep a sufficient supply of timber at any such mine where the same is required for use as props, so that the workmen may at all times be able to properly secure the said workings from caving in, and it shall be the duty of the owner,

agent, or operator to send down into the mine all such props when required, the same to be delivered at the entrance of the working place,"

was applicable to this case. That section of the statute must be construed in the light of the whole act. The design of the act is clearly apparent; that is, to protect men who are engaged in the business of mining coal, the extraction of which, by reason of its formation and the angles at which it usually lies in the ground is extra hazardous. "Coal Mines" is the subject of the act, and the protection of workmen in coal mines is its object. It provides for inspection, underground maps, ventilation, measurement of air, openings, exits, signals, hoisting pumps, safety lamps, proper tools, and care of the men engaged, as well as timbering. It is a complete act, and in our judgment cannot be held to apply to a discovery or exploring tunnel in which no coal is being mined, as was the case here. The work here engaged upon was in no sense different from the work of those engaged in exploring for gold or silver or copper. The work of coal mining was not being done, and might never be done in or through that tunnel. The tunnel was not a coal mine, but it might become a part of one, depending upon future developments. Statutes must be construed according to the natural, obvious, and popular meaning of the language employed. Potter, Dwarris on Statutes, pp. 143, 144. And when so construed, it would extend the coal mine statute beyond the limit of legislative intention to hold that a rock tunnel was a coal mine and subject to its operation. In speaking to a like question, the appellate court of Illinois said, in *Springside Coal Min. Co. v. Grogan*, 53 Ill. App. 60:

"It is argued that the object and purpose of the statute was to guard against accidents and injuries of the exact kind and character as that which resulted in the death of the husband of the appellee, and that her case is clearly within the reason and spirit of the enactment. This is as fully true of all pits or holes made in the earth, and if allowed to control, would extend the operation of the statute to pits or holes

by which it was designed to reach and open lead or other mines of every kind. Pits or holes intended to be used as salt wells or to procure water for stock or other purposes, where employes would be exposed to like danger, as that which caused death in the case at bar, would be equally within the spirit and reason of the statute. The General Assembly, however, restricted the statute to coal mines. Courts may expound statutes, but have no power to enact them, nor to extend such as are enacted, to cases which it might seem in good reason ought to be, but are not, included within them. 'All authorities agree, it is said, in Sutherland on Statutory Construction, Sec. 235, that courts cannot correct the excesses, or supply omissions in legislation.' "

In considering the applicability of certain instructions such as were given by the court in this case and to which exceptions were taken, the court said, in the same case:

"Each of the instructions assumes that the pit or hole in which the deceased was working, was a coal mine, and each declares that the statute required the mouth of the pit to be fenced. Whether it was a coal mine was a question of fact. The declaration alleged, and the proof indisputably showed, that the deceased, when killed, was engaged in digging the earth in the bottom of a pit or hole, which was intended, when completed, to be used as the shaft of a coal mine, which the appellant company designed to open and operate. No mine was being operated or worked; no coal had been mined; none had been found to mine; nor was it ever shown that there were any indications of the existence of coal that the pit or hole would ever reach."

The ordinary definition of a mine is familiar, but a coal mine has not been so frequently defined. In *Westmoreland Coal Co.'s Appeal*, 85 Pa. St. 344, the court said:

"It may be conceded that the term mine, when applied to coal, is generally equivalent to a worked vein, for by working the vein, it becomes a mine."

Just when a tunnel or shaft may develop into a mine may be determined with reasonable certainty. In *Coal Run Coal Co. v. Jones*, 19 Ill. App. 365, it was contended that a certain

shaft was not a "coal mine," and that the statute did not apply. The facts and conclusion of the court are as follows:

" 'The Coal Run Company had just completed an extension of its shaft below a vein of coal that it had been working and mining and had reached and dug through a lower vein and had dug several feet below it for the purpose of collecting the drainage of the mine,' and in the opinion of the court says, 'workmen were actually engaged in mining coal from the first vein. . . . . The deceased himself was about to pick up and place in the cage a lump of coal sufficient to justify a finding that the place was a coal mine, within the meaning of the statute, and we think nothing beyond that is or was intended to be held.' "

Our conclusion that the statute does not apply in this case receives assurance from the fact that the section of the statute relied upon says that "it shall be the duty of the owner, agent, or operator to *send down into the mine* all such props when required, the same to be delivered at the *entrance of the working place,*" indicating as clearly as language could indicate anything, that the legislature had in mind those conditions peculiarly incident to the mining of coal which usually lies in blanket formation; that it is brittle and without strength to sustain itself; that it forms in layers through which strata or rock slate or shale run, and which tend to make it more dangerous, and out of which gangways and chambers are cut; the mining of which has so frequently been described in previous cases decided by this court, particularly in: *Cox v. Wilkeson Coal & Coke Co.*, 61 Wash. 343, 112 Pac. 231, and *McKenzie v. North Coast Colliery Co.*, 55 Wash. 495, 104 Pac. 801.

While the master is bound to use that degree of care which the attending circumstances and the character of the work will allow, for the protection of workmen engaged in extending all tunnels (for the coal mine statute does not relieve him of his common law duty), we find no warrant in the law authorizing us to extend or apply the coal mine act to a prospecting

tunnel, when the legislature itself has purposely refrained from doing so. There may have been reasons why the presumption of negligence or the denial of the defense of assumption of risk was not put upon the less hazardous business of the ordinary miner or prospector engaged in driving a tunnel through solid rock, or the sewer contractor, or the director of underground work; for the one who is seeking to develop an industry is not to be discouraged, while the one who has established a business should be prepared to meet the burdens incident to its promotion. There being enough evidence to carry the case to the jury upon the common law liability of the appellant, but that evidence being conflicting, we cannot say that the jury found with respondent upon the main issues and against him upon the statute, or with him upon the statute and against him on the common counts. The submission of the case upon the coal mine act was, therefore, error calling for a new trial.

Much is made in the brief of appellant that it was denied the right to show that it was the custom of men engaged in tunnel work to test and examine the roof for themselves, and that under a condition subject to constant change, reliance could not be had on a test made by the tunnel boss at some considerable time before the accident occurred. It is true that the trial judge excluded certain testimony and offers to prove such custom, but a careful reading of the whole record shows that, nevertheless, the offered and excluded testimony was thereafter received in such form as would warrant the jury in considering it. In the event of another trial, it may not be out of place to say that, in the absence of specific rules promulgated by the company or prescribed by statute, evidence of such custom is competent, and would be applicable in this case, provided the jury should find the character of the roof to be such as to require constant inspection or testing.

Practically all of the questions raised in this case are brought here on exceptions to instructions given, and to the refusal of the court to give requested instructions. The in-

structions, taken as a whole, barring those based upon the coal mine act, state the law of the case. There is some confusion, but no greater confusion than is to be expected where both sides have apparently submitted a complete set of instructions from which the trial judge has made up a set to be given to the jury, without re-writing them so as to harmonize seeming contradictions.

Reversed and remanded for a new trial.

RUDKIN, CROW, and MORRIS, JJ., concur.

DUNBAR, C. J. (dissenting)—I dissent. I think the narrow construction placed upon the statute by the majority fixes a limit upon its application which was not contemplated by the legislature; and that the fear expressed that the provisions of the statute might be made to apply to gold, silver, or copper mining, is more fanciful than real. If it develops in the trial of a cause that the exploration was made in a gold, silver, or copper mine, of course the statute would not apply, and the court would so instruct. But in this case there was not a suggestion that the tunnel was not being run in the interest of the coal mine. The plaintiff in the case is the Carbon Hill Coal Company. The opinion starts out with the statement that, "in January, 1910, the appellant was engaged in running a rock tunnel at the Carbon Hill coal mine" (and it was at that date that this accident occurred). The testimony shows and the opinion states that the tunnel was being driven by miners, with the hope or expectation of cutting a ledge or deposit at depth, and there is no claim or suggestion in the testimony that the excavation was in the interest of anything else than a coal mine, or that the tunnel was being driven for any other purpose than collecting or locating a ledge of coal. The following excerpt from the testimony of the foreman of the mine is suggestive:

"Q. What is the difference between running a rock tunnel and running ahead into your coal and mining out the coal? A. Our gangways are driven on the same principle when we

mine in coal, and shoot the rock out in the bottom, if the coal is on a pitch, and shoot the coal out first, and have a hole up here for the rock, and shoot it out. Q. That is not the only rock tunnel you have up there in the Carbon Hill coal mine, is it? A. We have driven thousands of feet of it. Q. A rock tunnel is one of the incidents of every coal mine, either to find the vein or whether it is run through to cross-cut different veins? A. They drive them for that purpose."

When it conclusively and confessedly appears that the rock tunnel was being operated in a coal mine for the purpose of discovering ledges of coal, I can see no reason why the statute which guards the safety of miners in a coal mine should not apply. The construction placed upon the statute by the majority opinion ignores the spirit and reason of the law, and it is the letter that killeth.

[No. 9273. Department Two. February 1, 1911.]

ALECK B. BESELOFF, *Respondent*, v. CHARLES J. STRANDBERG *et al.*, *Appellants*.[1]

MASTER AND SERVANT—ASSUMPTION OF RISKS—QUESTION FOR JURY. A miner working in a tunnel does not assume the risks where, upon discovering a crack in the roof, he called the same to the attention of the owner, who made an inspection and pronounced it safe, directing the miner to work there the rest of the day, after which props would be put in.

SAME—PROMISE TO REPAIR. In such a case, the promise to put in props after the miner had quit for the day, was the inducement for the miner's continuance of work, and is not open to the objection that the promise and inducement do not concur.

APPEAL—REVIEW—HARMLESS ERROR—INSTRUCTIONS. Error in defining contributory negligence where there was no evidence thereof is superfluous and not prejudicial to defendant.

SAME. Stating that assumption of risks means that "he took the chances of it" is not prejudicial error where the instructions as a whole fairly defined assumption of risks.

[1]Reported in 113 Pac. 250.

Appeal from a judgment of the superior court for King county, Gay, J., entered May 20, 1910, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a mucker in a tunnel through the fall of overhead rock. Affirmed.

Brady & Rummens and *Carl J. Smith*, for appellants.

Jay C. Allen and *Philip Tindall*, for respondent.

CHADWICK, J.—Plaintiff was employed as a mucker in a mine located on Esther Creek, near Fairbanks, Alaska. The mine was owned and operated by defendants. The mine was in gravel formation, and the manner of operating was as follows: A shaft had been sunk to the bed rock, and from the bottom of this shaft a drift or tunnel, about ten or twelve feet wide and eight feet high, was made into the dirt. The bed rock thus became the floor of the tunnel. The earth and gravel was frozen from the surface to the bed rock, and the tunnel was extended by driving steam pipes, called "points," into the face, through which steam was driven, until the earth and gravel was sufficiently thawed to permit of their removal. This was done by loading the loose material in wheelbarrows. These were propelled to the shaft, where the contents were carried to the surface and there washed for gold. The tunnel was lighted by electricity, the light being extended nearly to its face.

At about 5:30 o'clock in the afternoon, plaintiff, while engaged about his work, discovered a crack in the top and running lengthwise of the tunnel. This crack was about five or six feet long and, while the testimony is not entirely clear, it is likely that it was large enough for him to put his fingers in. At about this time Dave Strandberg, one of the defendants, came into the tunnel, and his attention was called to the crack by plaintiff, who said, "That looks bad." Strandberg carried a candle set in a miner's candlestick. He examined the crack, aided by the light of the candle, and then stuck the candle into the side wall of the tunnel and picked

at the crack with a miner's pick. He satisfied himself that it was safe, saying to the plaintiff: "That is all right. You must finish all loose dirt. You keep working until six. When you quit I will put props under it and hold it up." After a short time, five or ten minutes (plaintiff had made one load and was reloading his barrow), a chunk of frozen earth fell from the roof of the tunnel, striking plaintiff on the ankle, breaking the ankle, and resulting in a permanent anchylosis and dislocation. From a verdict entered on a judgment in favor of the plaintiff, defendants have appealed.

The defense in this case is grounded on the doctrine of assumption of risk, and that the danger was open, obvious, and so apparent that a man of ordinary prudence would not hazard his life and limb by continuing his work after notice thereof. The defense also involves the principle, which we believe has never been directly urged in this court—that is, admitting that Strandberg did promise to repair or, as in this case, to timber the roof of the tunnel, it was a promise to repair or remove the danger after respondent's work was done, and was not made for the benefit of, or with intention that it would inure to his benefit during the time he was at his work, the testimony showing that he would go off shift at six o'clock; and therefore the promise would not relieve respondent of his duty to himself, or exempt him from the rule of assumption of risk. It would be idle for us to review the many cases decided by this court wherein it has been held that a man is bound to exercise common sense and take notice of such dangers as by the use of his senses are apparent, or ought to be apparent, to a man of ordinary prudence. These are general rules, but they are not so fixed that they may not be modified when the testimony reveals a state of compelling circumstances. Just how far a servant may go in acting upon a promise of the master to make a dangerous place safe cannot be set down as an inflexible rule of law; for, notwithstanding expressions which may be gleaned from the cases, it is generally a question of fact to be determined by the jury

having reference to the qualifying facts and circumstances of the particular case. *Bailey v. Mukilteo Lumber Co.*, 44 Wash. 581, 87 Pac. 819; *Christianson v. Pacific Bridge Co.*, 27 Wash. 582, 68 Pac. 191; *Johnson v. Collier*, 54 Wash. 478, 103 Pac. 818; *Morgan v. Rainier Beach Lumber Co.*, 51 Wash. 335, 98 Pac. 1120, 22 L. R. A. (N. S.) 472.

So here, although appellants insist that respondent knew, or should have known, that the place was dangerous, and that he assumed the risk of continuing his work, they are met by the judgment of one of the defendants who, after a careful inspection with candle and pick, pronounced the tunnel safe. Shall we then say that, where two men, each having an interest in his own safety, have differed in their judgment, the minds of reasonable men sitting as jurors cannot differ, and that respondent should be held to answer for his negligence while appellant is exonerated from his error of judgment? In all hazardous occupations, and especially in mining, occasions must of necessity arise—and frequently, too—which call for the exercise of judgment. One may see a danger and the other insist that there is no danger. At such times, it would seem, and indeed the history of the cases shows it to be true, that almost without exception the common laborer will give way to the judgment of the master. Inexperience will follow that experience which bears an assumption of superior knowledge. The obvious deductions from these premises, then, is that, where a question of danger arises and there is a difference of judgment and the master assures the servant that it is safe to proceed with his work, the servant proceeds at the risk of the master, and the defense of assumption of risk will not avail, unless there is a showing of a new condition following the assurance of the master that would bring the servant within the general rule.

In *Green v. Western American Co.*, 30 Wash. 87, 70 Pac. 310, quotation is made from *Harder etc. Min. Co. v. Schmidt*, 104 Fed. 282:

"Whatever may be the exemption of the employer from

liability for injuries caused by a danger that is obvious to the injured, such exemption will not be accorded where the nature of the menace is so uncertain as to cause discussion between the employees and the employer, with the result that the employer dissuades the employee of his apprehension."

The *Green* case and the principle there announced have been consistently followed by this court. *Goldthorpe v. Clarke-Nickerson Lumber Co.*, 31 Wash. 467, 71 Pac. 1071; *Grout v. Tacoma Eastern R. Co.*, 33 Wash. 524, 74 Pac. 665.

Passing to the next question; that is, that the promise if made was not made for the benefit of respondent, and therefore did not absolve him from the assumption of risk. The promise, it will be remembered, was to put in timbers at or after six o'clock, the time when respondent would quit his work for the day. Appellants cite 1 Dresser, Employer's Liability, pp. 588-9: "In other words, the promise must be the inducement for the plaintiff to continue at work and the promise and inducement must concur."

This is unquestionably the rule, and it does not in our judgment bear the construction put upon it by counsel; that is, that "in order to shift the assumption of risk by reason of the promise to repair, it must be such a repair as will affect the safety of the person to whom the promise is made." The true rule is, was the promise the inducement for the servant to continue his work. If it was, he was warranted in so doing, unless it would appear that the danger was such as to deter a man of ordinary prudence. True, the promise and the inducement must concur; but it does not follow that performance shall follow forthwith. If it did, the question we are now discussing would never have arisen. In *Morgan v. Rainier Beach Lumber Co.*, *supra*, the principle is clearly announced that a servant who continues his work, under a promise to repair within a reasonable time, cannot be held to an assumption of risk when injured within the limit of time fixed by the master. The rule cannot be made to rest

upon, or the liability excused by reference to time if in fact the promise was the inducement upon which the servant acted. It will not do to hold, under such circumstances, that the promise was not made for the benefit of the servant, in the light of the rule that the master is charged with a primary duty of putting the servant to the performance of no work of an extra hazardous nature without warning him of the danger.

Nor does *Primley v. Elbe Lumber & Shingle Co.*, 58 Wash. 687, 102 Pac. 763, sustain appellants in their contentions. In that case the request was not made because of known or apprehended danger to the servant. But its object was to serve an entirely different purpose; to save "the loss of time, labor, and material." The case of *Showalter v. Fairbanks, Morse & Co.*, 88 Wis. 376, 60 N. W. 257, is relied on. This case was cited by this court in the *Primley* case, as sustaining the proposition, not there necessary to be decided, that a promise to remove a danger usually applies only to machinery, tools, and the like, which are dangerously defective, and not to ditches and tunnels, as suggested in that case and as is contended by counsel in this one. But in the *Showalter* case, the distinction between the rule there announced and the one applicable to the case at bar, if there be a distinction, is attempted to be drawn by the writer of the opinion. The court said:

"The evidence of the plaintiff is that he relied on the superintendent's assurance that the ditch was safe, in going back to work. He nowhere claims that he relied on the promise to brace up the ditch. There must be reliance on the promise to repair, in order to make such a promise of any avail as an excuse to the employee."

In this case the promise to timber is not denied. The question in all this class of cases is, was the promise the inducement to continue at work, and did the respondent act as a man of ordinary prudence in the light of all facts and

circumstances. The promise, the time of performance, the surrounding circumstances, and the act of the servant, must be considered; not one alone, but all; and when so considered, we think the jury in this case was amply justified in holding that respondent did not assume the risk.

It is insisted that the court so defined the terms "contributory negligence" and "assumption of risk," as to deprive appellants of the force of these definitions. It is unnecessary to discuss the definition of contributory negligence. There is no testimony tending to show that respondent was negligent in any degree. The definition would therefore be superfluous, and could not be held to be prejudicial. In defining assumed risk, the court said, "The word 'assumed' means that he took the chances of it." These words were used by the court in defining the issues made by the pleadings. While we think that the words complained of might well have been omitted, nevertheless they should not be held to be prejudicial to the appellants. The instructions as a whole fairly define assumption of risk and state the law of the case. The use of the words objected to would not call for a reversal, under *State v. Letica*, 61 Wash. 629, 112 Pac. 748; *Engelking v. Spokane*, 17 Wash. 272, 110 Pac. 25; *Hoseth v. Preston Mill Co.*, 49 Wash. 682, 96 Pac. 423, and *Johnson v. Northport Smelting & Refining Co.*, 50 Wash. 567, 97 Pac. 746.

Other objections to instructions are based on appellants' theory of the law, or upon an assumption of facts which in our judgment are not warranted by the testimony; as, for instance, that the rocks and earth were constantly falling from the roof of the tunnel in such quantities as to charge respondent with a knowledge of certain danger, and that the crack in the roof of the tunnel was constantly growing larger while respondent was working under it.

The argument of counsel being based upon an unsupported theory of the law, and upon facts which we find did not exist,

or had been decided against appellants by the jury, the further objections need not be discussed.

Judgment affirmed.

RUDKIN, CROW, and MORRIS, JJ., concur.

[No. 9295. Department Two. February 1, 1911.]

J. L. KAHALEY, *Respondent*, v. FRYE & BRUHN, INCORPORATED, *Appellant*.[1]

MUNICIPAL CORPORATIONS—STREETS—RUNAWAY TEAMS—INJURY TO PEDESTRIAN—SUFFICIENCY OF NEGATIVE EVIDENCE. There is sufficient evidence to support a finding of the violation of a city ordinance making it unlawful to leave any team standing unless it is securely fastened, where a delivery team equipped with a hitching weight ran away and eyewitnesses testified that they saw no weight dragging, although the driver testified on direct examination that he dropped the weight and set the brake; and the testimony in support of the verdict is not so purely negative as to preclude the jury from determining its weight, especially where the driver on cross-examination admitted that he sometimes did leave the team without hitching it.

SAME—INSTRUCTIONS. In an action for injuries through the running away of a team left unhitched, where proof of a custom of hitching teams by a weight was admitted to show the manner of hitching, upon an issue as to whether the driver dropped the weight, it is not error to instruct that the question was what the driver did and not what other teamsters were in the habit of doing.

Appeal from a judgment of the superior court for King county, Ronald, J., entered September 9, 1910, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a pedestrian, run down by a runaway team. Affirmed.

Roberts, Battle, Hulbert & Tennant, for appellant.

Chas. F. Munday and *Walter S. Fulton*, for respondent.

[1]Reported in 113 Pac. 247.

CHADWICK, J.—About six o'clock on the evening of the 16th day of January, 1909, plaintiff, a pedestrian, while crossing Columbia street at First avenue in the city of Seattle, was struck by a team of runaway horses, and hurled some distance onto a brick pile. He received injuries which the jury found to be permanent, and compensated in damages. Plaintiff had stepped off the sidewalk before he saw the team, which was then about fifteen feet away, and was caught before he could recover himself or retreat.

The team was hitched to a delivery wagon, and was owned and used by defendant to deliver meats from the Fulton market, then and, so far as the record shows, now operated by it. The market fronted on Second avenue, with a rear door on the alleyway between First and Second avenues. The driver, John Weston, had left the team at the rear door and gone into the shop to make up his load, which was arranged with reference to convenience and certainty of delivery and was a task which took some time. While he was thus engaged, the team ran away. Turning west on Columbia street, it went at great speed until brought to a standstill, a block or two beyond First avenue. A fact which will enter into the legal conclusions hereafter to be noticed, and proper to be stated here, is that it was provided by the ordinances of the city that it was unlawful for any person to leave any horse or other animal, attached to any vehicle or conveyance, in any public or uninclosed place without securely fastening or guarding it. Revised Ordinances, p. 192, § 30; p. 214, § 50. In compliance with these requirements, and following a general custom existing in Seattle, the rig was equipped with a forty-pound hitching weight. This was attached to a one-and-a-half-inch strap, leading along the wagon tongue, where it divided, and thence ran to the bits of each horse. A hole in the front of the wagon bed furnished a means of lowering the weight to the ground. The driver says that, when he left the team, the weight was down and the brake was set. There is no showing that the team was fractious or nervous. If

anything, the contrary is shown. There is no showing that there were any unusual noises, or anything to disturb the quiet of the team, or that the driver or defendant had any cause to anticipate any alarm whatever. Nor is it seriously contended that the ordinances of the city were not complied with, so far as the manner provided for hitching the team is concerned. Whether it was employed on this occasion is the question that vexes us. The case was tried before a jury, and from a judgment entered upon a verdict awarding damages in the sum of $2,000, this appeal is prosecuted.

It is the theory of the appellant, that no presumption of negligence arises from the mere fact that the team ran away; that it was necessary for respondent to go further and prove affirmatively some positive act of negligence or some omission of duty, before he can recover. On the other hand, it is the theory of the respondent that, if one is injured by a team running wild on the highway, unattended by a driver, a presumption of negligence follows, and in the absence of exonerating facts, the owner is liable; it being asserted that there is a well-settled distinction in the authorities between those cases where the team is running wild, and those where the team is running away in spite of the efforts of the driver. The lower court adopted the theory of respondent. For this, and a refusal to sustain the usual motions attending a jury trial, and a refusal to give requested instructions, a reversal of the case is insisted upon. It is further insisted that, although the lower court was right in its ruling on the motion for nonsuit, and a *prima facie* case was made out, appellant has met the burden by showing a compliance with the ordinances and customs hereinbefore alluded to, and its motions for judgment at the close of the case and for a new trial should be granted.

Carefully prepared briefs have been filed by counsel, but we feel that it is unnecessary to review the authorities. Without committing the court to the doctrine contended for by appellant, we may, so far as this case is concerned, accept it.

as the law, and still we think an affirmance of the judgment must follow. For, admitting that no presumption of negligence follows from the mere running away of a team, we are nevertheless controlled by the rule that legal conclusions as well as presumptions flow from a known or admitted state of facts, or where upon the whole record the minds of reasonable men would not differ as to the facts.

Now, to reverse and remand this case, we must hold, as a matter of law, that appellant's driver did, in fact, drop his forty-pound weight; or, in other words, "securely fastened" his team within the meaning of that term as defined by the ordinance and the custom relied upon. While the circumstances tending to show a failure to do this are slight, in our judgment they are evidence, and their weight was for the jury. The eyewitnesses of the accident, who testified in support of plaintiff's case, say that they did not see any weight dragging under the wagon when the team passed. We think this was enough to carry the case to the jury upon the motion for nonsuit. Nor do we think this circumstance comes within the rule of negative testimony. If a person, seeing the accident and having an equal opportunity to observe, says that he did not see a certain thing or object, it is evidence, and the weight of it must be left to the jury, unless its character is so purely negative and the positive testimony is so plain that there can be but one conclusion drawn by the court or jury. The rule laid down in Jones on Evidence (2d ed.), 898, is:

"But the rule that positive testimony is of greater weight than negative has some important exceptions, and it should never come in conflict with the general rule that the weight of the testimony should be left to the jury; such testimony is admissible, and, together with corroborating circumstances, may outweigh positive testimony. As will be seen from the cases already cited, this question of the weight to be given to negative testimony often arises in railroad and other accident cases where it is claimed that signals were not given. In such cases the question is purely for the jury, and it has often

been held that negative evidence was sufficient to sustain a verdict. It is familiar practice to allow a witness, after he has described the situation, to state that he would have heard a bell or whistle, if it had sounded. The courts have frequently recognized a qualification of the general rule under discussion in those cases where one witness testifies that a fact occurred and another, having the same or better means of knowledge, testifies positively that it did not occur, each having testified as to his memory of the matter in difference."

And in Wigmore on Evidence, vol. 1, § 664:

"In applying the foregoing principle requiring that the witness' inferences be based on adequate data, courts have often been asked to exclude testimony based on what may be called *negative knowledge*, i. e. testimony that a fact did not occur, founded on the witness' failure to hear or see a fact which he would supposedly have heard or seen if it had occurred. But there is no inherent weakness in this kind of knowledge. It rests on the same data of the senses. It may even sometimes be stronger than affirmative impressions. The only requirement is that the witness should have been so situated that in the ordinary course of events he would have heard or seen the fact had it occurred."

This case is to be distinguished from the case of *Long v. McCabe & Hamilton*, 52 Wash. 422, 100 Pac. 1016, where the question was the competency of a winchman. The testimony offered to prove incompetency was wholly negative. It might have been all true, and the winchman still have been competent. We held that such showing as was made was overcome by a positive showing that the alleged incompetent servant had had years of experience as a winchman and that the defendants could not on that account be held to a failure to use ordinary care in his employment.

The fact noted, when coupled with the evidence of the driver who said on cross-examination:

"Q. Did you ever leave this team standing without putting the weight down? A. Very seldom. Q. Did you sometimes? A. Not down town, I did not. Q. I am not asking you that. A. I have done it sometimes; yes, sir. Q. Sometimes you get off the wagon and forget to drop the

weight? A. I do not know that I forget it, no, sir. Q. You sometimes do not do it, then? A. Yes, sir. Q. How often have you done that in the course of your teaming? A. Not very often. Q. You have done it? A. Yes, sir, I might make a short stop, but not long enough to load, and up on the hill;"

makes it probable that the driver may have been mistaken in this instance. The question is at least debatable, and its solution was for the jury.

There are a number of errors assigned going to the instructions of the court, but we think our conclusion covers all of them, unless it be an exception to an instruction wherein the court said:

"The question is not what other teamsters were in the habit of doing, but what did the teamster in this case do; and did that, if he did anything, constitute a secure fastening or guarding under all the facts and circumstances."

It is earnestly contended that this instruction took away from the jury all consideration of the question of custom. We believe the instruction was warranted. The custom was, if proven, a proper fact for the jury to consider; but proof of it would not exonerate the defendant so long as the question of compliance with it was a debatable question in the case then being tried. Proof of custom was received to show the manner of securing teams in the city of Seattle, and could not be accepted as proof of itself that the team was so secured on this occasion.

The judgment is affirmed.

DUNBAR, C. J., RUDKIN, CROW, and MORRIS, JJ., concur.

[No. 9272. Department Two. February 1, 1911.]

JAMES J. CONWAY *et al.*, *Appellants*, v. MINNESOTA MUTUAL LIFE INSURANCE COMPANY, *Respondent*.[1]

INSURANCE—LIFE INSURANCE—FORFEITURE—REINSTATEMENT—DISCRETION OF OFFICERS. Under a policy of mutual life insurance providing that a delinquent member may be reinstated in the discretion of the officers upon furnishing satisfactory evidence that he is in good health, the discretion of the officers in refusing a reinstatement is not a judicial discretion reviewable by the courts; and it cannot be said that the officers were not justified in refusing a reinstatement on its appearing that his habit of using liquors was increasing.

SAME—FORFEITURE—WAIVER. Where the secretary of a mutual life insurance company, without authority or notice to the proper officers, accepted a delinquent assessment without a reinstatement under the terms of the policy, it is not a binding waiver of the right of the company to refuse a reinstatement after another default.

DUNBAR, C. J., and RUDKIN, J., dissent.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered March 14, 1910, dismissing an action for damages, upon withdrawing the case from the jury. Affirmed.

Boyle, Warburton & Brockway, for appellants.

Hudson & Holt, for respondent.

MORRIS, J.—Appeal from a judgment of dismissal, in an action to recover damages for the alleged wrongful refusal to reinstate a life insurance policy, after forfeiture by nonpayment of assessments and dues. There is no dispute as to the facts; from which it appears, that on November 13, 1894, The Bankers' Life Association of St. Paul, Minnesota, which subsequently changed its corporate name to that of respondent, issued its policy of insurance upon the life of James J. Conway, in the sum of $2,000. This policy was upon the cooperative assessment plan, providing for annual dues and mortuary assessments, according to the

[1]Reported in 112 Pac. 1106.

terms of the articles of incorporation, which by reference were made a part of the policy. In July, 1908, an assessment of $40 became due under the policy, which Conway received notice of but failed and neglected to pay, whereby his policy lapsed. On November 5, 1908, he applied for reinstatement, forwarding to the company the July assessment, with $7.50 dues and a certificate from Dr. Libbey that he was then in good health. On November 11, the company acknowledged the receipt of $47.50, and informed Conway that his certificate had lapsed, but that he might be reinstated upon furnishing satisfactory evidence of present good health; but that in order to procure such reinstatement, it would be necessary for him to be examined by Dr. Dewey, the medical examiner of the company at Tacoma, and such examination must disclose a satisfactory condition of health. In the same letter, Conway was informed the company would not accept the $47.50, and the same was returned. On November 17, Conway presented himself to Dr. Dewey for medical examination, and the doctor's certificate was mailed to the company. On December 11, Conway was informed by the company that his application for reinstatement was rejected.

The question now submitted is, Did Conway have such a legal right to reinstatement as can be enforced against the denial of such right by the company? It will readily be admitted, as stated in Cooley's Briefs on Insurance, at page 2395, that after a forfeiture of a life insurance policy because of nonpayment of assessments, "the right to reinstatement depends on the provisions of the contract. Since the right is not absolute, the insurer may impose such conditions as it sees fit, not contrary to public policy, on which reinstatement may be had *(Saerwein v. Jamon*, 65 N. Y. Supp. 501)." Upon the same page, the rule is also laid down that compliance with the conditions gives the delinquent an absolute right to reinstatement, if the provisions of the contract do not make the reinstatement optional with

the officers of the company. The provision of the contract in this instance is found in the articles of incorporation, and is as follows:

"Any person, having once been a member of this company, may be readmitted in the discretion of the officers of this association, upon his furnishing them satisfactory evidence that he is in good health, and upon his paying to said association all assessments due and other sums of money which he would have been called upon to pay to this association had he continued to be a member thereof."

Respondent contends—which was also the theory upon which the court below made its order of dismissal—that this provision destroys the absolute right to reinstatement, and makes such reinstatement optional with the officers of the company, in providing that readmission shall be in their discretion, and that the evidence of good health shall be such as is satisfactory to them. and that having so acted, such discretion is not reviewable in the courts; while appellants contend that the word "discretion," is to be construed in the sense of judicial discretion, and may be reviewed when it appears to have been arbitrarily exercised, as they claim here.

While it may be difficult to give satisfactory definition of the term "judicial discretion," because of the wide difference of authorities as to its nature, it may be said to be a discretion that is sound and guided by the fixed principles of law. 6 Ency. Plead. & Prac., 819. But even in cases calling for the exercise of such discretion, it will not be reviewed except for its manifest abuse. Such is, we believe, the universal rule. Where, however, discretion is vested in a nonjudicial body, such as trustees or officers of a corporation, or other public functionaries, its exercise does not call for the application of any fixed rules or principles of law, and its meaning cannot be so limited nor restricted; since to do so would be to take such a discretion away from the body upon which it is conferred and bestow it upon some other body, and so on *ad infinitum*, so long as the right of appeal or review existed. In the case

of *Judges v. People*, 18 Wend. 79, Senator Tracy, in his opinion, while not clear in his mind as to the proper meaning of a discretion that is governed by legal principles, finds no difficulty in defining a discretion that is not so controlled, and says, at page 99:

"It means, when applied to public functionaries, a power or right conferred upon them by law, of acting officially in certain circumstances, according to the dictates of their own judgment and conscience, uncontrolled by the judgment or conscience of others."

A like construction is adopted in *Brown v. State*, 109 Ala. 70, 20 South. 103, where, in reviewing the provisions of the statutes of Alabama in fixing the punishment for certain crimes by providing such punishment shall be, "at the discretion of the jury," the court says, at page 83:

"The words of the statute, *at their discretion*, are peculiarly significant and expressive of the freedom in the exercise of judgment, of the liberty of action and decision, entrusted, and exclusively entrusted, to the jury. The *discretion* they are to exercise, and exercise in obedience to their own consciences only, is the choice of election between the alternative punishments. The discretion is legal, in the sense that it is derived from and conferred by law. But it is not of the nature of judicial discretion, which is said to be controlled by fixed legal principles . . . It must have been foreseen and anticipated that there would be jurors reluctant to inflict capital punishment . . . that there would be some reluctant to convict on circumstantial evidence; and that not infrequently there would be some not so fully satisfied as others, that the evidence of guilt reached the standard the law prescribes. These are considerations which will influence the jury in choosing between the alternative punishments; a choice they must make according to the dictates of their own judgment and consciences, and which cannot be controlled or directed by the judgments or consciences of others."

We do not know the facts operating upon the minds of the officers of this company, inducing them to exercise their discretion against the reinstatement of this applicant, nor why

his evidence of good health was not satisfactory to them, except as we read the record and find therein facts which might have influenced them in arriving at the conclusion they did. In his first application for membership, Conway gave his age as about fifty years, and in response to an inquiry as to the extent of his use of ardent spirits, wine, or malt liquors, answered, "One glass a day." In his application for reinstatement, he gave the date of his birth as March 22, 1842, which would have made his age fifty-two years, seven months and nine days at the time of his first application. In both, he stated that his father and mother both died from unknown causes when he was a child. In response to an inquiry as to his use of liquors each day, he answered, "Malt liquors, two or three glasses; wine, none; spirits, two or three drinks." In his first application, the medical examiner rated him as a first class risk; in his application for reinstatement he was rated as a first class risk, "except for age and amount of stimulants taken."

Statements as to age and habit as to use of liquors are statements material to the risk, and while we do not hold, as a matter of law, that the discrepancies here noted would, in themselves, be sufficient to avoid the policy or to prevent reinstatement, if such question was purely one of law and properly submitted to us as such, we cannot say that they would not influence the sound judgment and good conscience of an officer of an insurance company in whom discretion is vested to pass upon such matters. Neither can we eliminate from this contract the fact that this medical examination upon application for reinstatement must disclose a condition of good health satisfactory, not to the applicant nor to the physician conducting the medical examination, but to the officers of this company in whom, by his contract, the applicant had placed the judgment and discretion to decide; a decision they must arrive at "according to the dictates of their own judgment and consciences, and which cannot be controlled or directed by the judgment or conscience of

others." To hold otherwise would be to destroy that element of individuality and personal judgment which must enter into any decision, and to substitute for the discretion and satisfaction of one body the discretion and satisfaction of other bodies, strangers to the contract and not within its contemplation, and making the contract read in effect that reinstatements may be had upon the applicant furnishing evidence of reasonably good health, instead of, as it does read, "in the discretion of the officers of this association, upon his furnishing them satisfactory evidence that he is in good health."

The nearest case in point we have found is *Graveson v. Cincinnati Life Association*, 6 Ohio Cir. Dec. 327, where the policy was forfeited on March 11 for failure to pay an assessment due March 1. In September following, the insured offered to pay all arrearages, and asked for reinstatement. The rules of the association provided for medical examiners whose duty it was to make all examinations, and who might accept or reject applications. The association having declared its willingness to reinstate the applicant upon his furnishing a satisfactory medical examination, he submitted to such examination, and as a result thereof, was rejected, the only reason given by the medical examiner being that the applicant's pulse was between 76 and 100. The court, in touching upon this feature of the case, says:

"This brings us to the only remaining question in the case, and that is as to the medical examination—was it satisfactory? In the first place to whom was it to be satisfactory? The constitution and by-laws provided that as to all applications it should be within the discretion of the medical director to accept or decline any application; but as to forfeiture, it provided that 'by furnishing a new and satisfactory application and medical examination,' one might be restored, saying nothing as to whom this examination should be satisfactory. We are of the opinion, however, that this examination must be satisfactory to the medical director. It certainly could not have been intended that the examination should only be satisfactory to the applicant, or to any one

whom he might select to make the examination. Why should the defendant require the performance of these conditions if they were not to be satisfactory to the defendant?"

This case was affirmed, without opinion, by the supreme court of Ohio in 56 Ohio St. 725.

We will discuss one other feature, and that is appellants' contention that the company waived its right to reject the application in accepting dues and assessments from him on a prior occasion, after the time fixed for their payment, and also in writing him that his right to reinstatement was conditioned upon his "furnishing satisfactory evidence of present good health." What we have said disposes of the latter contention, such satisfactory evidence of good health meaning satisfactory to the company, and giving it the right of rejection, if, in the exercise of this discretion vested in it, such evidence was not satisfactory. In support of the first feature of this contention, appellant testified that he knew the time for payment had passed, but thought he would be reinstated by showing he was in good health, "because it happened once before. I was behind once before in my delinquency, and had no trouble at all." This would not be sufficient to estop the company from now insisting upon the provisions of the contract. A party to a contract, who does not take immediate steps to forfeit it because of a default in payment does not thereby lose his right to insist upon a forfeiture for subsequent nonpayments. *Cash v. Meisenheimer*, 53 Wash. 576, 102 Pac. 429; *Garvey v. Barkley*, 56 Wash. 24, 104 Pac. 1108; *Walker v. McMurchie*, 61 Wash. 489, 112 Pac. 500.

This same contention was raised in *Graveson v. Cincinnati Life Ass'n, supra*, and it was there held that such a payment, being accepted by the secretary of the company (to whom the payments were also made in the case at bar), would not constitute a binding waiver, it not appearing that it was done with the knowledge and approval of the officers of the company in whom the power of forfeiture existed. Such is the

case here. The secretary not having the right to forfeit, his unknown and unapproved act could not bind the company where the act of the company complained of is based, not alone on the failure to pay the assessment when due, but upon the failure to pass a satisfactory medical examination upon the application for reinstatement.

For these reasons, we are of the opinion that the judgment of dismissal was rightly entered, and the same is affirmed.

Chadwick and Crow, JJ., concur.

Dunbar, C. J., and Rudkin J., dissent.

[No. 8993. Department Two. February 2, 1911.]

American Radiator Company, *Respondent*, v. Frank R. Pendleton *et al.*, *Appellants*.[1]

Mechanics' Liens—Fixtures—Heating Plant. A boiler, radiators, and other appliances, attached to a hot water heating system, furnished with pipes etc. under a building contract, are fixtures and subject to a mechanics' lien as part of the building, although they could be detached without damage, it being conceded that the pipes were fixtures and that some of the articles were designed for use in the particular building.

Appeal from a judgment of the superior court for Snohomish county, Hardin, J., entered February 19, 1910, upon findings in favor of the plaintiff, in an action to foreclose a mechanics' lien. Affirmed.

Cooley & Horan and *R. Mulvihill*, for appellants.

Warren H. Lewis and *William Levine*, for respondent.

Crow, J.—Action by American Radiator Company, a corporation, to foreclose a materialman's lien. From a decree in its favor, the defendants have appealed.

[1]Reported in 112 Pac. 1117.

The controlling question before us is whether the materials became fixtures and a part of the realty, or whether after installation they were personal property. The evidence shows that the appellants Ira B. Pendleton and Janet Pendleton, his wife, were building a new dwelling house on three lots, in the city of Everett; that the plans and specifications prepared by their architect called for a hot-water heating plant, and a boiler, radiators, and other equipment to be connected therewith; that a distributing system of pipes was built into the house; that through the appellant Peter W. Barton, their agent, they ordered and respondent furnished a boiler, a number of radiators, and other appliances to be attached to the distributing system; that the materials thus furnished were attached by couplings and connecting devices, in such a manner as to permit their removal without damage to the building or the pipes; and that a number of the radiators were of peculiar construction, being designed for use in certain designated locations when installed.

Appellants insist that the boiler, radiators, and other appliances did not become fixtures; that they could be removed without damage to the building; and that they continued to be personal property, for which respondent was not entitled to claim or foreclose a lien on the building. There is no issue as to the form or sufficiency of the lien notice, the amount due, or the sales made. If the materials became fixtures, a part of the building, and were used in its construction, then respondent was entitled to a lien. Rem. & Bal. Code, § 1129.

In *Filley v. Christopher*, 39 Wash. 22, 80 Pac. 834, 109 Am. St. 853, we said:

"Little could be gained by a review of the authorities as to what constitutes a fixture. As said by this court in *Philadelphia Mtg. & Trust Co. v. Miller*, 20 Wash. 607, 56 Pac. 382, 72 Am. St. 138, 44 L. R. A. 559. 'There is a wilderness of authority on this question of fixtures, and a hopeless conflict of decision.' The true criterion of a fixture is the united applica-

tion of these requisites: (1) Actual annexation to the realty, or something appurtenant thereto; (2) application to the use or purpose to which that part of the realty with which it is connected is appropriated; and (3) the intention of the party making the annexation to make a permanent accession to the freehold. Within this rule, we are of opinion that all, or nearly all, of the articles above referred to are fixtures, and a part of the realty. Nearly all the authorities concur in holding that a furnace and boiler, together with the radiators and piping connected therewith, such as are above described, constitute a part of the realty. *Thielman v. Carr*, 75 Ill. 385; *Folsom v. Moore*, 19 Me. 252; *Main v. Schwartzwaelder*, 4 E. D. Smith (N. Y.) 273; *Raddin v. Arnold*, 116 Mass. 270; *Hopewell Mills v. Taunton Sav. Bank*, 150 Mass. 519, 23 N. E. 327, 15 Am. St. 235, 6 L. R. A. 249; *Goodin v. Elleardsville Hall Ass'n*, 5 Mo. App. 289; *Capehart v. Foster*, 61 Minn. 132, 63 N. W. 257, 52 Am. St. 582; *Woodham v. First Nat. Bank*, 48 Minn. 67, 50 N. W. 1015, 31 Am. St. 622. These views are not inconsistent with the decision in *Philadelphia Mtg. & Trust Co. v. Miller*, *supra*. In that case the boiler was in no manner attached to the building except by its plumbing connections."

Appellants were constructing a new building with heating plant and appliances as a part thereof. Their plans and specifications called for the boiler, the radiators, and all other appliances furnished by respondent. Although such appliances could after their connection be separated and removed without damage to the building, we do not think they were installed by appellants with any such purpose in view, or with any intention that they were to be considered as personal property should appellants subsequently decide to vacate or to sell the premises. Appellants' intention must be deduced from their actions in erecting the building and installing the heating apparatus, in pursuance of the plans and specifications so prepared by their architect. The contractor was required to install the entire heating plant as a complete job. Appellants concede that the distributing pipes became a part of the realty. There is no evidence of any action or declaration on appellants' part indicating their

intention that the boiler, radiators, and other appliances furnished by respondent should not become permanent fixtures, nor is there any circumstance from which we can infer their intention to remove them as personalty at any time thereafter, and not permit them to remain a part of the freehold. It was shown that the materials were furnished; that they were installed in the manner above stated; that they were required by the specifications; and that a portion of them at least were designed for use in this particular building. In view of these facts and circumstances, we conclude that they became fixtures, and that the judgment of the superior court should be affirmed. It is so ordered.

DUNBAR, C. J., RUDKIN, CHADWICK, and MORRIS, JJ., concur.

[No. 9131. Department One. February 2, 1911.]

J. G. STEWART, *Appellant*, v. STATE BOARD OF MEDICAL EXAMINERS, *Respondent*.[1]

APPEAL—NOTICE—TIME FOR TAKING—PHYSICIANS AND SURGEONS. Rem. & Bal. Code, § 8399, requires that an appeal to the supreme court from an order of the superior court on appeal from the medical board must be taken within sixty days, and an appeal not so taken will be dismissed.

Appeal from a judgment of the superior court for King county, Holcomb, J., entered March 18, 1910, upon findings in favor of the defendant, upon an appeal from the state medical board. Appeal dismissed.

Milo A. Root, for appellant.

Howard G. Cosgrove and *Higgins, Hall & Halverstadt*, for respondent.

PER CURIAM.—Respondent moves to dismiss this appeal, upon the ground that the same was not taken within the time

[1]Reported in 112 Pac. 1106.

provided by law. This motion must be granted. It appears that the appellant filed his application with the board of medical examiners, for a license to practice medicine within the state, under § 4 of the medical act of 1909 (Rem. & Bal. Code, § 8389). The application was denied. The applicant thereupon appealed to the superior court of King county, where the decision of the medical board was affirmed by an order which was entered on March 18, 1910. The appellant, on May 28, 1910, served, and on May 31, 1910, filed, his notice of appeal to this court.

The statute regulating appeals in such cases provides that "either party may appeal from the judgment of said superior court to the supreme court of the state in like manner as in civil actions within sixty days after the rendition and entry of such judgment in said superior court." Rem. & Bal. Code, § 8399. The notice of appeal was not given within the sixty days after the entry of the order appealed from. The appeal must therefore be dismissed. *State v. Seaton*, 26 Wash. 305, 66 Pac. 397.

[No. 9210. Department One. February 2, 1911.]

LUCY A. JOHNSON *et al.*, *Respondents*, v. ELIZABETH MAE RYAN *et al.*, *Appellants*.[1]

PLEADING—OBJECTIONS—WAIVER. Where no demurrer is interposed to a complaint, it will be liberally construed and the cause determined by the proof, rather than by a strict construction of the pleadings.

VENDOR AND PURCHASER—RESCISSION BY VENDEE—FRAUD—FAILURE OF CONSIDERATION—EVIDENCE—SUFFICIENCY. There is sufficient evidence to warrant the rescission of an exchange of land for defendants' hotel, for fraud and partial failure of consideration, where it appears that the defendants greatly overstated the amount of the monthly receipts and removed a large amount of furniture included in the trade; an examination of the hotel not affecting plaintiffs' right to rescind for fraud as to the earnings.

[1]Reported in 112 Pac. 1114.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered June 9, 1910, upon findings in favor of the plaintiffs, in an action for cancellation. Affirmed.

Grant A. Dentler, for appellants.

Frank S. Carroll and *L. C. Whitney*, for respondents.

MOUNT, J.—This action was brought by the respondents to rescind a contract of sale and to set aside deeds conveying certain real estate to the appellants, on the alleged ground of fraud and deceit practiced upon the respondents by the appellants, and also on the ground of partial failure of consideration. The cause was tried to the court without a jury. Findings of fact were made in favor of the plaintiffs, and a decree was entered rescinding the contract and setting aside the deeds. The defendants have appealed.

It appears that the appellants were in possession of a building at No. 931-933, South C street, in Tacoma, under a lease for two years. This building was known as the American Hotel, and was conducted by appellants as a lodging and apartment house. In December, 1909, the parties to this action entered into negotiations for an exchange of certain real estate belonging to the respondents for the hotel property, which included the lease of the building, the furniture, and certain leases to lodgers therein. These negotiations resulted in an exchange which was concluded on December 23, 1909, when the respondents deeded their real estate to the appellants, and appellants surrendered possession of the hotel to respondents. The latter on January 6, 1910, brought this action to rescind the contract, upon allegations as follows:

"The said defendants fraudulently and unlawfully, knowingly and maliciously represented to these plaintiffs that said hotel was free from debt except $1,665, and that said furniture was of the value of $5,000; . . . that rent was paid to the first of January, 1910; that there was due from

roomers occupying said rooms sums aggregating $420, . . . which these plaintiffs were to receive; that after the agreement between said parties was made . . . the said defendants fraudulently and unlawfully took from the said rooms in said hotel, furniture to the amount of six or eight hundred dollars; that said defendants fraudulently misrepresented to these plaintiffs the condition of affairs in said hotel regarding the payment of rent for the month of December, 1910, and that said defendants fraudulently and unlawfully misrepresented to these plaintiffs the amount of the income of said hotel, stating that the income would amount to $535 to $560 every month; . . . that there is owing in back rent on said premises the sum of $275; that these plaintiffs were notified by the landlord to vacate said premises by reason of the fact that the defendants had failed to pay their back rent as required by said lease; that prior to the commencement of this suit, these plaintiffs tendered to the defendants the return of said American Hotel, including furniture, fixtures and lease, but the same was refused by the defendants; . . . that the plaintiffs relied and acted upon the false and fraudulent representations of said defendants and were thereby induced to enter into the above agreement."

These allegations of the complaint were denied by the answer of the defendants. The cause came on for trial, and the defendants objected to the introduction of any evidence, upon the ground that the complaint failed to state a cause of action. This objection was denied, and at the close of the evidence, the judge said:

"After carefully considering all the testimony in the case, I believe that there was more than an overreaching of the plaintiffs; that methods of misrepresentation and deceit were employed in connection with the change of property of such a character that the court as a matter of right and justice should set the transfer aside; and this is further evidenced by the circumstances of the removal by the defendants of a large amount of furniture from the hotel."

The appellants now argue that the complaint is insufficient, because it does not allege that the false representations related to existing material facts, or that the appellants

knew of such falsity, or that the respondents were ignorant of the falsity and believed the representations to be true, or that the respondents were damaged, or that there was any concealment from the respondents, or that they made no examination, or that there was any confidential relation existing between the parties.

In *Carey v. Hays*, 41 Wash. 580, 84 Pac. 581, we said:

"A more liberal construction will always be given to a pleading that is assailed after issue joined and trial had than will be when the sufficiency of the pleading is raised upon a demurrer."

And in *Walsh v. Meyer*, 40 Wash. 650, 82 Pac. 938, we said:

"It may be conceded that the complaint in this case is exceedingly meager, and we will not now decide upon its sufficiency if it had been challenged by demurrer. But this court will not scan a complaint too critically where there has been no demurrer interposed, but the case has been allowed to go to trial to the extent of settling the pleadings and creating the expense of a convocation of the witnesses, as we do not regard such a practice as commendable."

Under such conditions the cause of action is determined by the proof, rather than by a strict construction of the allegations of the complaint.

Appellants next argue that the facts proven are not sufficient to warrant the judgment. There was much conflict in the testimony as to representations which were made by the appellants to respondents. It appears from the testimony of the respondents that the appellants represented that the receipts amounted to from $535 to $560 per month, and that the business was constant. It also appears that the respondents took possession on January 23, 1909, and thereupon the receipts did not meet the representations, and within a few days thereafter it became apparent that the receipts and constancy of the business would not nearly reach the amount represented. The fact that the respondents examined the hotel was not sufficient to put them upon notice of the con-

stancy of the business, or the ordinary receipts thereof. Such facts, in the nature of things, must be known only to the appellants, and we think the respondents would be justified in relying upon the representations of appellants in that respect. The respondents also testified that the agreement was that all of the furniture and fixtures in the hotel on December 21, 1909, was to be delivered to them, with the exception of a piano, a music cabinet, and the personal wearing apparel of the appellants; that on the date possession was delivered, the appellants removed from the building some two or three dray loads of furniture without the knowledge of the respondents. The removal of this furniture apparently constituted the principal reason for a rescission of the contract. It is true that the evidence is conflicting upon the question whether the appellants removed furniture which was included in the sale, but the trial court found that they did so, and the weight of the testimony seems to be to that effect. The rule in such cases is:

"Where one of the parties to a contract of exchange of property has on his part fully performed the contract by conveying or delivering the thing which he agreed to give in exchange, upon the failure or refusal on the part of the other party to perform the contract he may affirm the contract and maintain an action at law for the value of the thing which he should have received or an action for damages for breach of contract; or he may sue in equity for specific performance. On the other hand he may rescind the contract and sue at law for the specific property with which he has parted, or the value thereof; or he may sue in equity for the rescission of the contract." 17 Cyc., page 836 *et seq.*

The respondents in this case pursued the remedy of rescission, which was clearly proper. The furniture in the hotel was necessary to conduct the business. The respondents were entitled to all the furniture for which they bargained. A failure to deliver a part of the furniture was to that extent a failure of consideration, for which rescission was a proper remedy.

Upon the facts found, the court was justified in entering the decree appealed from. The judgment is therefore affirmed.

Dunbar, C. J., Parker, Fullerton, and Gose, JJ., concur.

[No. 9250. Department One. February 2, 1911.]

Carl Aboltin, *Respondent*, v. M. J. Heney, *Appellant*.[1]

Damages—Personal Injuries—Inadequate Verdict—New Trial. A verdict for $1,500 damages for the loss of a hand by a carpenter thirty-three years of age, in good health, earning forty to sixty cents an hour, and who was able to earn only fifty dollars in the eighteen months following, is so manifestly inadequate as to authorize the trial court to set it aside as given under the influence of passion or prejudice, under Rem. & Bal. Code, § 399, which places inadequate and excessive verdicts on the same footing.

Appeal from an order of the superior court for King county, Chapman, J., entered June 21, 1910, granting plaintiff a new trial for inadequacy of damages, after the verdict of a jury rendered in favor of the plaintiff for personal injuries. Affirmed.

John P. Hartman, for appellant.

Edwin H. Flick, for respondent.

Gose, J.—The plaintiff, a carpenter by trade, thirty-three years of age and in good health, had his right hand crushed on July 31, 1908, so that it was necessary to amputate it on that date at a point about one inch above the wrist. At the time he received the injury, he was in the employ of the defendant and engaged in the work of driving piles. The trial of the case began on the 8th day of February, 1910, eighteen months after the injury was sustained. Between the date of the injury and the trial of the case, he had earned about $50.

[1]Reported in 113 Pac. 245.

His largest earnings after he lost his hand were at the rate of six cents an hour and board. He has found it impossible to procure employment, except at rare intervals and for short periods of time. Before he received the injury, he earned from forty to sixty cents an hour at his trade, and paid six dollars a week for board. No evidence was offered as to his life expectancy. The jury gave him a verdict for $1,500. A new trial was granted upon the plaintiff's motion. One ground for his motion is "inadequate damages, given under the influence of passion or prejudice." The defendant has appealed from the order granting a new trial. The trial judge filed a memorandum opinion, in which he expressed the view that, if passion or prejudice may be presumed when the jury award excessive damages, it may equally be presumed when they award inadequate damages. Laws 1909, pages 53-4, § 1 (Rem. & Bal. Code, § 399), provides that a new trial may be granted on the motion of the aggrieved party, for "excessive or inadequate damages appearing to have been given under the influence of passion or prejudice," and materially affecting the rights of the moving party.

The appellant contends that the court is powerless to grant a new trial in an action of this kind for the recovery of unliquidated damages, "unless the amount is so unreasonable and excessive or inadequate as to be indicative of passion, prejudice, partiality, or corruption of the jury." This is merely a statement of the provisions of the statute, in a somewhat different phraseology. It will not be denied that the purpose of the action is to recover compensation for the loss the respondent has suffered as a result of the injury. We are aware that there is no fixed standard by which the damages can be determined in a case of this character. Despite the fact that the respondent's damages could not be measured with exactness, it was the duty of the jury to compensate him for his loss. The verdict established the appellant's liability.

The court instructed that, if the jury found for the respondent, they should consider his age, occupation, the nature

and extent of the injury, his earning capacity, the extent of its impairment, his pain and suffering, and his mental anguish arising from his disfigurement, in fixing the amount of compensation. It is argued that, there being no exact admeasurement of damages in such cases, the verdict of the jury should be final and conclusive where the amount awarded is substantial, and that the granting of a new trial was an abuse of discretion. We cannot acquiesce in this view. It is true that, in the first instance, the jury is the tribunal that must determine the quantum of liability. But it is equally true that the statute contemplates that cases may arise where the jury failed to give the case the calm deliberation that the law exacts, and the burden is therefore put upon the trial judge of determining whether that standard of duty has found expression in the verdict. The trial judge is clothed with broad discretion in determining whether the recovery is so large or so small in a given case that passion and prejudice may be presumed. Where liability has been established, the damages should be compensatory. In the case at bar, the damages awarded are but little more than the respondent could have earned between the date of the injury and the trial. It is difficult to account for the verdict on any theory other than that of passion and prejudice. That the award is not commensurate with the loss the respondent has suffered is so obvious that it would seem that reasonable minds could hardly differ on that question. Both the granting and the refusal to grant a new trial are matters within the sound discretion of the court, and the judgment of this court will not be disturbed except in cases where such discretion has been abused. *Winningham v. Philbrick*, 56 Wash. 38, 105 Pac. 144.

The trial court has the same discretion to set aside a verdict for inadequate damages as it has to set it aside for excessive damages. The one verdict stands upon no higher plane in law than the other. *McDonald v. Walter*, 40 N. Y. 551; *Benton v. Collins*, 125 N. C. 83, 34 S. E. 242, 47 L. R. A. 33; *Chouquette v. Southern Elec. R. Co.*, 152 Mo. 257, 53

S. W. 897; *Lefrois v. Monroe County*, 34 N. Y. Supp. 612; *Tathwell v. City of Cedar Rapids*, 122 Iowa 50, 97 N. W. 96.

In the *Collins* case, it was said that: "The power to correct prejudiced and grossly unfair verdicts must be vested somewhere, and, in our judgment, it is best that such power be confided to the judges who preside over the trials." In the *Chouquette* case, there was a verdict for the plaintiff and a new trial granted upon his motion. It was held that it is the peculiar and special duty of trial courts to grant new trials when the verdict is arbitrary or manifestly wrong, or where it appears that the jury were swayed by passion and prejudice.

In *Alton v. Chicago M. & St. P. R. Co.*, 107 Minn. 457, 120 N. W. 749, the jury gave the plaintiff a verdict for $3,450, for personal injuries sustained while in the discharge of his duties as a brakeman. His injuries were so serious that it was necessary to amputate his left leg. He also sustained such injuries to his right leg as to leave it weakened and not strong enough to support him. There were other minor injuries. The order granting a new trial was affirmed. In *Mariani v. Dougherty*, 46 Cal. 26, the plaintiff's intestate was killed by a rock thrown by a blast which the defendant caused to be exploded. The plaintiff recovered a verdict for $200, and a new trial was granted upon his motion. In affirming the order, the court said: "A new trial may be granted where the damages are too small as well as where they are too large."

Kilmer v. Parrish, 144 Ill. App. 270, announces the doctrine that "the modern rule is that a new trial may be granted where the verdict is grossly inadequate, for the same reasons as those governing where the verdict is excessive. . . . A verdict for a grossly inadequate amount stands on no higher ground on legal principles than a verdict for an excessive or extravagant amount." In that case there was a verdict for the plaintiff for one dollar, for personal injuries inflicted upon her through the defendant's negligence. There

was also a slight injury to plaintiff's carriage, and she incurred a small expense for medical assistance. The trial court denied her a new trial and the judgment was reversed.

Anglin v. Columbus, 128 Ga. 469, 57 S. E. 780, was reversed because of the abuse of discretion of the trial court in denying the plaintiff a new trial when she had sustained a serious injury and the jury had awarded her $100. In *Hill v. Union R. Co.*, 25 R. I. 565, 57 Atl. 374, the judgment was reversed and a new trial ordered. In that case the jury gave the plaintiff a verdict for $200 for personal injuries. The court said that a new trial would not be granted in such cases unless, "it is very clear that the jury have been influenced or controlled by other considerations, or have acted under the influence of a perverted judgment in fixing damages." In *Caldwell v. Vicksburg S. & P. R. Co.*, 41 La. Ann. 624, 6 South. 217, a verdict for the defendant for $1,000 where the injuries were much less serious than in the case at bar, was increased on appeal to $2,000.

The appellant has cited a great many cases, but in practically all of them a new trial was denied by the trial court. As we have said, a broad discretion is vested in the trial court to grant or refuse a new trial. Appellate courts are always reluctant to interfere where that discretion has been exercised, and will never do so unless it seems clear that the discretion has been abused.

We think that there was no abuse of discretion, and the judgment is affirmed.

DUNBAR, C. J., PARKER, MOUNT, and FULLERTON, JJ., concur.

[No. 9320. Department Two. February 2, 1911.]

THE STATE OF WASHINGTON, *Respondent*, v. CONSTANTINO CATSAMPAS, *Appellant*.[1]

MAYHEM—INFORMATION—SUFFICIENCY. An information, practically in the language of the statute, charging the accused with biting off the end of the nose of a person with intent to disfigure him, sufficiently charges maiming, as defined by Rem. & Bal. Code, § 2407.

WITNESSES—IMPEACHMENT—CRIMINAL LAW. In a criminal prosecution, where a witness for the state had testified that he did not know what the accused had said after the fight, it is prejudicial error for the state to attempt to impeach the witness by showing that he had made other statements to the prosecuting attorney; since it did not affect his credibility as to any affirmative statement made by him, and only had the effect to get before the jury the alleged declarations of a discredited witness.

CRIMINAL LAW—TRIAL. In a criminal prosecution, it is not commendable practice to allow a witness to give a spectacular illustration and reproduction of a fight before the jury.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered September 14, 1910, upon a trial and conviction of maiming. Reversed.

Grant A. Dentler, for appellant.

J. L. McMurray, *A. O. Burmeister*, and *F. G. Remann*, for respondent.

DUNBAR, C. J.—The information in this case is as follows:

"That the said Constantino Catsampas, in the county of Pierce, in the state of Washington, on or about the 17th day of August, 1910, then and there being unlawfully and feloniously did then and there, with intent to disfigure one John Propper, wilfully inflict upon him the said John Propper an injury, to wit: a biting off of the end of the nose of the said John Propper with the teeth of the said Constantino Catsampas, thereby seriously disfiguring the person of the said John Propper."

[1]Reported in 112 Pac. 1116.

There was a demurrer to the information on the ground that the facts stated did not constitute a crime. The overruling of this demurrer is alleged as error.

The statute upon which the information is based is as follows:

"Every person who, with intent to commit a felony, or to injure, disfigure or disable another, shall willfully inflict upon him an injury which—

"(1) Seriously disfigures his person by any mutilation thereof; or

"(2) Destroys or displaces any member or organ of his body; or

"(3) Seriously diminishes his physical vigor by the injury of any member or organ;

"Shall be guilty of maiming and be punished," etc. Rem. & Bal. Code, § 2407.

It is contended by the appellant that the facts charged do not fall within any of the provisions of said statute. But to our minds they so plainly do that no argument could be more convincing than the mere recitation of the statute and the facts set forth in the information.

The third assignment of error is based upon the action of the court in admitting testimony tending to impeach one of the state's witnesses. One Hanson, who was introduced by the state, after detailing the circumstances of the fight in which the end of John Propper's nose was bitten off by the appellant, in answer to the question: "What did you hear Catsampas say, if anything, after that?" Said:

"I don't know. Somebody back of me shouted; he said, 'Let them fight;' and somebody said, 'What did you do to him?' Catsampas said, 'You don't know what he done to me.' Then he mumbled something after that. I could not exactly hear what it was after that, but he mumbled something. I could not say for sure what it was. I am not positive what he did say, so far as that is concerned."

Then, after some further questions, the following was propounded:

"Didn't you tell me at that time, Mr. Hanson, that you

heard Catsampas say, immediately after they were separated —after you had separated them, 'There, I have done something to you now, Joe, that you will never get back in one hundred thousand years?"

Afterwards the attorneys for the state, A. O. Burmeister and Fred G. Remann, on rebuttal, testified concerning a conversation that they had with the said Hanson, wherein he had told them that Hanson, in relating the circumstances of the fight, said to them that the defendant had said, "There, I have done something to you now, Joe, that you will never get back in one hundred thousand years." This testimony was admitted over the objection of the appellant, and such admission is urged as prejudicial error.

From the foregoing it will be seen that this is not a case where a party offering a witness is taken by surprise by reason of an affirmative statement by said witness prejudicial to its interest; but this was simply a negative statement on the part of the witness, which in itself was in no degree prejudicial. The only contention is that the witness did not state the case as strongly as the attorneys for the state desired, or as they claimed he had stated it to them. There was nothing detrimental to the state's interest in what he did say. The complaint is in regard to what he did not say.

This case cannot be distinguished from *State v. Simmons*, 52 Wash. 132, 100 Pac. 269, where the court, in discussing this question, said:

"Romer Zimma was called as a witness for the appellant, and in response to a question, testified that he did not see the complaining witness and a third party hugging and kissing each other at a time and place specified. He was then asked the following question: 'Now, Romer, don't you remember of stating to me that at the time you saw Parrot at Johnson's, winter before last, that you saw them in the kitchen by themselves, hugging and kissing each other?' to which an objection was sustained, and on this ruling the twentieth assignment of error is predicated. Had the witness testified to some affirmative fact prejudicial to the appellant, the ruling complained of would perhaps be erroneous. Greenleaf, Evidence,

§ 444. But the witness testified to a mere negative, and had he been ever so successfully impeached the only effect would be to destroy testimony which was in itself worthless. The error was therefore harmless."

So in this case, the object of the testimony not being to affect the credibility of a witness concerning any affirmative statement by him which would be prejudicial to the state's interest, the only effect it could have would be to get before the jury the alleged statement of a discredited witness—discredited by the state itself.

The second assignment of error was based on the action of the court compelling the appellant to give a spectacular illustration and reproduction of the fight before the jury, using the deputy prosecuting attorney, who was the cross-examining counsel, to represent his antagonist Propper. In view of the probability of a retrial in this case, we will simply say that such practice is not commendable.

But for the third error assigned, which has been discussed above, the judgment will have to be reversed. It is so ordered.

RUDKIN, CROW, MORRIS, and CHADWICK, JJ., concur.

[No. 9251. Department One. February 4, 1911.]

E. HOCKING, *as Administrator of the Estate of H. E. Dean, Deceased, Appellant*, v. BRITISH AMERICA ASSURANCE COMPANY, OF TORONTO, CANADA, *Respondent*.[1]

INSURANCE—FIRE INSURANCE—POLICY—EXEMPTION. Under a policy of fire insurance exempting the company from liability "for the loss caused directly or indirectly by invasion, insurrection, riot, civil war, or commotion, or military or usurped power, or by order of any civil authority or by theft," the word "indirectly" covers all the causes named, and the company is not liable for a fire resulting from fumigation ordered by the board of health.

SAME—CAUSE OF FIRE. In such a case, the proximate cause of the fire is the order directing the fumigation, and not the negligence of the officers.

[1]Reported in 113 Pac. 259.

Appeal from a judgment of the superior court for King county, Tallman, J., entered June 13, 1910, granting a nonsuit in an action upon a policy of fire insurance. Affirmed.

Walter A. Keene, for appellant.

Granger & Clarke, for respondent.

Gose, J.—This is an action upon a policy of insurance for $1,000, issued by the defendant to the plaintiff's intestate, insuring him for the term of three years from the 21st day of November, 1906, against all direct loss or damage by fire to a certain building, occupied by the insured as a residence and situated at Hot Springs Station, in King county. On the 25th day of June, 1908, and within the life of the policy, the building was totally destroyed by fire. The policy of insurance contains this clause:

"The company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war, or commotion, or military or usurped power, or by order of any civil authority or by theft."

The defendant claims that the clause quoted exempts it from liability. It bases its exemption upon the following facts: The insured died of smallpox the day preceding the fire, and was removed from the house for burial about one hour before the fire occurred. The fire resulted from a fumigation of the house, ordered by the board of health. At the close of the plaintiff's testimony, a judgment of nonsuit was entered. The plaintiff has appealed.

The appellant first contends that the word "indirectly" has reference only to the causes preceding the phrase "or by order of any civil authority;" that this is made plain by the use of the word "by" in the phrase last quoted, and that the exemption in that clause is available only in case of loss occurring "directly" by order of some civil authority. It is also said that the clause "or by theft" gives support to this

view. We think that such a construction would do violence to the language which the parties have seen fit to use, and that it would be also a strained and unnatural interpretation of their meaning. As was said in *Insurance Co. v. Boon*, 95 U. S. 117:

"Policies of insurance, like other contracts, must receive a reasonable interpretation consonant with the apparent object and plain intent of the parties. This is entirely consistent with the rule that ambiguities should be construed most strongly against the underwriters, and most favorably to the assured."

It is also contended that the proximate cause of the fire was the negligence of the health officer, and that the fire was not even the indirect result of the order of the board. It is argued that the exemption was only intended to apply to a case where the property is destroyed by some direct act of the civil authority to prevent the spread of fire or disease or such like. We think the contention is not sound. Putting aside refined distinctions, it is obvious that the preponderating or producing cause of the fire was the order of the board of health directing its inferior officers to fumigate the house. The civil authority put its own agency into operation, and the fire was the indirect result. There was no intervening cause. The proximate cause is the efficient cause, the one which puts the other causes into motion. *Conner v. Manchester Assur. Co.*, 130 Fed. 743, is in point. In that case the defendant had insured a crop of grain for the plaintiff against loss or damage by fire. By order of the board of supervisors of the county in which the insured property was situate, a fire was started in the grass upon certain pasture land, at a point three or four miles distant from the land upon which the plaintiff's grain was situated, for the purpose of destroying grasshoppers and averting the disaster which their presence threatened. The fire got beyond control, spread to the plaintiff's land, and burned his grain. The policy

contained a clause identical with the one under consideration. In applying it to the facts in the case, the court said:

"The facts that the loss was the result of a fire started on other property, and that the property of the plaintiff in error was not ordered to be burned, do not render the exemptions of the policy inapplicable. There was but one fire. It was ordered by civil authority. It indirectly caused the loss, and there was no intervening cause."

citing *Insurance Co. v. Boon*, 95 U. S. 117; *Grand Trunk R. Co. v. Richardson*, 91 U. S. 454. See, also, *Barton v. Home Ins. Co.*, 42 Mo. 156. The case of *Insurance Co. v. Boon*, *supra*, contains an exhaustive discussion of the principles applicable in stipulations like the one under consideration, and supports the view announced in the text.

The appellant relies upon the case of *Commercial Union Assur. Co. v. Pacific Union Club*, 169 Fed. 776. In that case it was not denied that the insured property was totally destroyed by fire. The policy, however, provided that the company should not be liable "for loss caused directly or indirectly by earthquake." Under this clause it was contended that the loss would have been prevented by the use of the water supply of the city, had not its use been prevented by the breaking of the water main by an earthquake shock occurring the day preceding the fire; and that the earthquake and not the fire was the proximate cause of the loss. In answering this argument, the court said:

"What did the parties mean by this express language of their contract? Is it at all reasonable to suppose that, when the company stipulated for exemption for loss by fire 'caused directly or indirectly by earthquake,' it meant that it should not be liable for any loss or damage by fire which could be prevented by the use of the water supply of the city in the event its use be prevented by the breaking of the water mains by an earthquake shock or shocks? As well might it also be said that the company meant that it should not be liable for any loss or damage by fire which could be prevented by the use of the fire department of the city of San Francisco in the event its use be prevented by the destruction of its apparatus,

or the killing or disabling of its men or horses by an earthquake shock or shocks."

Other interesting questions are presented by the record, but the view we have taken of the exemption clause makes it unnecessary to consider them.

The judgment is affirmed.

DUNBAR, C, J., MOUNT, PARKER, and FULLERTON, JJ., concur.

[No. 9001. Department One. February 4, 1911.]

ELIZABETH F. EDWARDS *et al.*, *Respondents*, v. SEATTLE, RENTON & SOUTHERN RAILWAY COMPANY, *Appellant*.[1]

APPEAL—REVIEW—VERDICT. A verdict supported by substantial evidence will not be disturbed on appeal because of conflict in the testimony.

PLEADING — COMPLAINT — SUPPLEMENTAL COMPLAINT. Notwithstanding Rem. & Bal. Code, § 308, allowing supplemental pleadings to show facts that occurred "after the former pleadings were filed," it is not error to permit a supplemental complaint to show facts that arose subsequent to the commencement of the action but prior to the filing of an amended complaint, and within the pleader's knowledge at the latter date, in view of the common law rule and the liberal rules of pleading enjoined by the code.

CONTINUANCE—PLEADING—SUPPLEMENTAL COMPLAINT. In the absence of special showing of prejudice, it is not error to deny a continuance to the defendant upon allowing plaintiff to file a supplemental complaint, where a reasonable time appears to have elapsed before the date of the trial.

APPEAL—HARMLESS ERROR—TRIAL—INSTRUCTIONS. The giving of an instruction that is too broad is not error where other instructions embodying the limitations thereon were properly given.

SAME. It is not error to refuse a requested instruction covered in the general charge.

TRIAL—MISCONDUCT OF JUDGE. It is within the province of the trial judge to make plain to the jury by suggestions to counsel matters that were left obscure, without being open to a charge of manifest partiality.

[1]Reported in 113 Pac. 563.

SAME. A tender by the judge of a pillow and blanket to attendants of an injured party is not an undue manifestation of sympathy in the presence of the jury.

DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for $8,500 for injuries to a passenger alighting from a street car, who six months thereafter was merely suffering from curable neurasthenia, is excessive and should be reduced to $5,500.

Appeal from a judgment of the superior court for King county, Gay, J., entered April 11, 1910, upon the verdict of a jury rendered in favor of the plaintiffs for $8,500 for personal injuries sustained by a passenger alighting from a street car. Reversed, unless $3,000 is remitted.

Morris B. Sachs, for appellant.

Elias A. Wright, for respondents.

FULLERTON, J.—The respondent, Elizabeth F. Edwards, with her two young daughters, took passage in one of appellant's cars to ride from a place near Rainier Beach, in King county, to Atlantic street, in the city of Seattle. As the car reached Atlantic street it stopped at the usual stopping place to permit passengers desiring to get off at that street to do so. The respondent thereupon, with her daughters, left her seat to get off the car. As she reached the place of exit, the conductor stepped off ahead of her and lifted her daughters to the ground, but as the respondent herself reached the steps, the motorman, mistaking the go-ahead signal of a passing car for a like signal on his own car, started the car forward. The conductor immediately stepped back onto the car and reached for the bell rope for the purpose of giving the stop signal, saying to the respondent to remain where she was until the car was again stopped. The respondent fell from the car and received the injuries for which this action is prosecuted.

At the trial there was but one seriously disputed question of fact, namely, whether Mrs. Edwards was thrown from the car by its sudden starting while she was in the act of alight-

ing therefrom, or whether she attempted to get off of the car of her own volition while it was in motion and fell while making the attempt. Since, however, the jury found for the respondents, they must necessarily have resolved this question in their favor, and since, furthermore, each view is supported by substantial evidence, we must accept the respondents' version as being the true one.

The respondents filed their original complaint on October 4, 1909. To this complaint a motion was interposed and sustained, and leave given to file an amended complaint, which was done on November 2, 1909. On February 23, 1910, the respondents obtained leave of court to file a supplemental complaint, setting up the fact that the injured respondent was pregnant at the time she received the injuries set forth in her original and amended complaints, and had, on or about the 1st day of November, 1909, suffered a miscarriage as the result of such injuries, causing her much pain and suffering, for which they ask additional damages. The appellant objected to the filing of the supplemental complaint, and after its objection had been overruled, moved the court to vacate the order setting the case down for trial, which had theretofore been entered, which motion the court likewise overruled.

It is contended that the court erred in allowing the supplemental complaint to be filed, for the reason that it appeared therefrom that the miscarriage had occurred prior to the time the amended complaint was filed and must necessarily have been known to the parties at that time. The statute provides that the court may on motion, "allow supplemental pleadings to be filed showing facts which occurred after the former pleadings were filed" (Rem. & Bal. Code, § 308), and it is thought that it precludes the filing of a supplemental complaint setting up matters which occurred subsequent to the filing of the original complaint, and prior to the filing of any amended complaint. But the rights of parties to an action at common law were determined by the facts existing at the time of its commencement, and such would be the rule

now but for the statute which permits facts occurring since that time and which affect the rights of the parties to be considered for that purpose. Following the logic of the situation, therefore, it is certainly proper practice to require all facts arising subsequent to the commencement of the action to be brought in by supplemental pleadings, while requiring matters existing at the time of the commencement of the action, but which have been inadvertently omitted from the pleadings, to be brought in by way of amendment. In this state, however, under the liberal rules of pleading enjoined by the code, it can make but little difference which method is pursued. The purpose of pleadings is to inform the adversary of the plaintiff's cause of action or the defendant's ground of defense, and when this is done the object for which the pleadings exist is accomplished, whether they are in form original or supplemental. In this case we find no error in the ruling of the trial court.

The complaint that the court erred in refusing to vacate the order setting the case for trial is equally without foundation. The time between the filing of the supplemental pleading and the date fixed for the trial was sufficiently long to enable the appellant to prepare to meet the new matter set forth therein; at least, on its face it appeared to be a reasonable time for that purpose, and this is sufficient in the absence of a special showing that prejudice therefrom actually accrued.

Errors of the court are predicated upon the giving of a certain instruction, and the refusal to give certain others requested by the appellant. It would not be profitable to set these forth at length. It is objected to the instruction given that it was too broad in its scope in that it did not embody therein the limitations upon the general doctrine stated. But these were elsewhere made clear to the jury, and this satisfies the rule. So with the requested instructions. They were given in substance in the instructions framed by the court. As we have repeatedly said, it is not necessary that

the court give requested instructions in the language in which they are presented, even though the language be unexceptionable; it is sufficient if the substance of the requests be given in the language of the court.

The appellant complains of the conduct of the trial judge. It is claimed that the judge did not at all times manifest that impartiality that becomes an officer charged with the administration of justice, but that he, by manifestations of temper, interruptions when the appellant's counsel was examining witnesses, suggestions to respondents' counsel, and unbecoming manifestations of sympathy for the injured respondent, so biased the jury in favor of the respondent and prejudiced them against the appellant as to deprive the appellant of a fair trial. But we are satisfied, after a careful examination of the record, that the complaint is unfounded. It was the evident desire of the judge to make plain to the jury matters that he felt counsel were leaving obscure, and it was to that end that his questions were directed. This manifestly is within the province of the trial judge. As to the complaint of undue sympathy, it appears that, at the opening of the trial, the judge tendered a pillow and blanket to the attendants of the injured respondent for her use while on the witness stand, but surely there was nothing in this that warrants a reversal of the case. It can hardly be believed that the jury could be prejudiced by a matter so insignificant.

A recovery of $8,500 was allowed, and appellant complains that this is excessive. The injured respondent at the time of the trial was suffering from neurasthenia, and this was the only objective symptom remaining from the injury that the medical experts were able to discover. This trouble, they also testified, was curable, and that the injured respondent would ultimately recover entirely from the effects of the accident. In view of this fact and the further fact that only six months had elapsed between the injury and the trial, we feel that the verdict is so far disproportionate to the injury suffered as to require submitting the question to another

jury if the respondents will not accept a reduced judgment. A recovery of $5,500 would, in our opinion, amply compensate the respondent for her injuries.

The judgment entered will be reversed, and the cause remanded to the lower court to enter a judgment for the respondent in the sum of $5,500, if they will consent in writing, within thirty days after the remittitur reaches that court, to accept a judgment for that amount, otherwise a new trial will be granted.

RUDKIN, GOSE, MOUNT, and PARKER, JJ., concur.

[No. 9304. Department One. February 4, 1911.]

THE STATE OF WASHINGTON, *on the Relation of W. H. Abbott et al., Plaintiff*, v. E. W. Ross, *Commissioner of Public Lands, Respondent.*[1]

PUBLIC LANDS—OYSTER LANDS—DEEDS — CANCELLATION — POWERS OF OFFICERS. The state land commissioner is authorized to hear and determine an application for the cancellation of a state deed for oyster lands, by Rem. & Bal. Code, § 6804, providing that if oyster lands sold by the state shall be used for any other purpose than oyster culture, the deed shall be cancelled upon application to the state land commissioner.

CONSTITUTIONAL LAW—JUDICIAL POWERS—ENCROACHMENT ON JUDICIARY—PUBLIC LANDS—OYSTER LANDS—POWERS OF LAND COMMISSIONER. Judicial powers are not conferred on the state land commissioner by Rem. & Bal. Code, § 6804, authorizing him to cancel a state oyster deed and determine that the land shall revert to the state when the lands have been used for purposes other than oyster culture; since the state deed is not absolute but conditional and contains the conditions of the defeasance, and administrative officers may be clothed with *quasi* judicial powers, having no authority to fix a penalty.

PUBLIC LANDS—OYSTER LANDS—DEEDS — CANCELLATION — NOTICE. Under Rem. & Bal. Code, § 6804, providing for the cancellation by the commissioner of public lands of state oyster land deeds for

[1]Reported in 113 Pac. 273.

breach of condition, but which fails to provide the form of notice to be given to the grantee, any suitable notice of application for the cancellation is sufficient.

STATUTES—IMPLIED REPEAL—PUBLIC LANDS — DEEDS — CANCELLATION. Rem. & Bal. Code, § 6804, providing for the cancellation of a state oyster land deed for breach of condition is not impliedly repealed by other general laws relating to tide lands somewhat inconsistent therewith; since there is no plain legislative intent to that end, and the act is not among the acts expressly repealed and may exist without any necessary conflict with the general acts.

Application filed in the supreme court December 20, 1910, for a writ of prohibition directed to the commissioner of public lands, to prevent the hearing of an application to cancel a sale of tide lands. Denied.

Kerr & McCord and *Hadley, Hadley & Abbott*, for relators, contended, *inter alia*, that the lands of relators being no longer public lands, the alleged notice and subpoena were without authority and void. 19 Cyc. 690, and note; 13 Ency. of Law, p. 1077; Rem. & Bal. Code, § 6613; Mechem, Public Officers, § 627; *Palmer v. Peterson*, 56 Wash. 74, 105 Pac. 179; *Shattuck v. Hastings*, 99 Mass. 23; *Rollins v. Riley*, 44 N. H. 9; *Welsh v. Callvert*, 34 Wash. 250, 75 Pac. 871. The commissioner of public lands was wholly without jurisdiction of the subject-matter in the premises. Laws 1895, p. 38, ch. 24, § 9; Rem. & Bal. Code, § 6804; Const., art. 4, § 6; *Welsh v. Callvert, supra; State ex rel. Bussell v. Callvert*, 33 Wash. 380, 74 Pac. 573; *Iron Silver Min. Co. v. Campbell*, 135 U. S. 286; *Emblen v. Lincoln Land Co.*, 184 U. S. 660. The provision in relators' deed for a reversion in case the lands are used for purposes other than as provided in the act, is a condition subsequent. 32 Cyc. 1096; *Archibald v. New York Cent. etc. R. Co.*, 157 N. Y. 574, 52 N. E. 567. The state must be a party to any proceeding to declare a forfeiture or reversion whereby the lands would revert to the state. *Powers v. Webster*, 47 Wash. 99, 91 Pac. 569. The authority to institute such an action is by statute vested in the attorney general only. Laws 1909, pp. 767, 768. It is

beyond the power of even a court to declare relator's deed cancelled on the two principal grounds set forth in the petition and notice and subpoena, to wit: (1) That the lands are not oyster lands nor suitable for the cultivation of oysters. *Welsh v. Callvert, supra; State v. Heuston*, 56 Wash. 268, 105 Pac. 474. (2) That relators have failed to cultivate oysters thereon. *State ex rel. Bussell v. Callvert, supra.*

The Attorney General, and *Geo. A. Lee, Assistant*, for respondent.

J. E. Horan and *Frank C. Owings, amici curiae.*

FULLERTON, J.—The legislature of the state of Washington, by an act approved March 2, 1895, provided for the sale of certain tide lands, then denominated tide lands of the third class, for the purposes of oyster culture. The act limited the quantity of land that could be sold to a single purchaser to one hundred acres, fixed the purchase price thereof at the rate of one dollar and twenty-five cents per acre, and required the applicant to accompany his application with a sworn statement to the effect that the lands sought to be purchased would be used for oyster planting purposes only. The act also provided:

"If from any cause any tract or tracts, parcel or parcels of land purchased under the provisions of this chapter shall become unfit and valueless for the purposes of oyster planting, the party having so purchased and being the in possession of the same may upon certifying such fact under oath to the commissioner of public lands and to the auditor of the county wherein such lands are situated and also upon filing under oath a certificate of abandonment of such tract or tracts, parcel or parcels of land, in the office of each of said officials, such party shall then be entitled to again make purchase as hereinbefore provided; or if said land be used by the purchasers or any successors in interest of such purchaser in whole or in part for other than the purposes specified in this chapter, then upon application by any citizen to the state land commissioner such sale may be canceled, and the land shall revert to the state and shall be subject to sale as

herein provided, but not to such defaulting purchaser or such defaulting successor in interest." Rem. & Bal. Code, § 6804.

On December 6, 1909, the relator W. H. Abbott, proceeding pursuant to the provisions of the foregoing act, applied to the commissioner of public lands, to purchase certain specifically described tide lands situated in Skagit county, alleging in his application that the lands described were suitable for oyster culture, and that it was his purpose to use the same for oyster planting purposes only. Thereafter, on March 22, 1910, after due proceedings before the commissioner of public lands, a deed was issued to the applicant conveying to him the land described, subject to the provisions of the act.

On December 3, 1910, one J. E. Horan filed a sworn complaint with the commissioner of public lands in which he alleged that the lands sold to the relator were not in fact lands suitable for the purposes of planting and cultivating oysters and that the relator had not used them for such purposes, but had, on the contrary, used them for hunting purposes, having caused to be erected thereon a number of shooting blinds. Upon filing the complaint, the commissioner of public lands, acting in his official capacity, gave notice to each of the relators that such a complaint had been filed, and cited them to appear on a day named and show cause, if any they had, why the deed should not be canceled, the sale held for naught, and the lands reverted to the state, as provided by the statute authorizing their sale. On service of this notice upon the relators, they filed the present application for a writ of prohibition against the commissioner of public lands, asking that he be prohibited from hearing the cause or in any manner interfering with the title acquired by them in virtue of the deed.

The relators base their claim to a writ on the contention that the commissioner is without jurisdiction to inquire into the matters set forth in the complaint on file before him, and

is without power or jurisdiction to set aside the deed or revert the lands to the state. In support of these contentions, it is argued, first, that the act itself does not purport to vest this power in the commissioner of public lands; and second, that if it does so attempt to vest it, that part of the act is unconstitutional and void. Upon the first question suggested, we have no doubt that the legislature intended to vest the power to cancel the sale in the commissioner of public lands. By referring to the quotation from the statute above given, it will be noticed that the sale is canceled on application made to the commissioner, which to our minds plainly implies that the commissioner himself shall make the cancellation.

The second question suggested is of more difficulty. It is claimed that this provision of the act is void because it is an attempt to confer judicial powers upon a purely administrative officer. But we think this objection not well taken. It will be observed that the act does not provide for an absolute conveyance to the purchaser of lands sold under its provisions. It is provided that the land so purchased must not be used in whole or in part for purposes other than the purposes of planting and cultivating oysters, and that if it be so used the sale may be canceled and the lands reverted to the state, and that the deed executed to evidence the purchaser's title shall "contain the conditions of defeasance in this act provided," (Id., § 6800). To determine, therefore, whether the land shall revert to the state, the commissioner of public lands has but to determine a question of fact, having no discretion as to the penalty that shall be imposed; the law itself imposing the penalty. This is but to exercise quasi judicial functions, not those ordinarily termed judicial by the authorities defining that term. Moreover, it is essential that the executive and administrative officers of the state have and exercise discretionary and quasi judicial powers. The business of the state, if the rule were otherwise, could hardly be carried on, and it is not possible that the constitution makers thought they were denying these officers these powers

when they enacted the provision in question. As we said in *Bellingham Bay Imp. Co. v. New Whatcom*, 20 Wash. 53, 54 Pac. 774:

"It can readily be understood that if all quasi judicial power or discretion were taken from administrative or executive officers, and every question of this kind, however small its importance might be, had to be submitted to a law trial, the courts would be incumbered with useless litigation, and the administration of the government would become so expensive that it would be intolerable."

In the case cited it was contended that the provisions of the Laws of 1893, p. 226, authorizing a city council of a city to render a decision determining the regularity of a reassessment, was unconstitutional as an attempt to confer judicial powers upon such bodies contrary to the constitution, but the court held the law valid. So, also, the railroad commission act was attacked on like grounds, it being contended that the attempt to vest power in that body to determine the necessity for railroad track connections and to direct such connections was void under this provision of the constitution, but the contention was held not sound, the court saying:

"While there is no question that the constitution of the state recognizes a division of the powers of the state into three separate co-ordinate departments, viz., legislative, executive, and judicial, it is well established that the special jurisdiction of each is understood to be applied in a limited sense, and it is not meant that they must be kept wholly and entirely distinct without any connection or dependence whatever or connecting link between them. Or, as was said by this court in *Bellingham Bay Imp. Co. v. New Whatcom*, 20 Wash. 53, 54 Pac. 774, if all quasi judicial powers were taken from administrative and executive officers, the courts would be incumbered with useless litigation, and the administration of the government would become so expensive that it would be intolerable. This question was examined at length in that case, and many cases reviewed, and the logic of the opinion and the conclusion reached is opposed to appellant's contention. In addition to this, no case has been cited by appellant, nor have

we been able to find any, which sustains the view contended for." *State ex rel. Oregon R. & Nav. Co. v. Railroad Commission*, 52 Wash. 17, 100 Pac. 179.

It is manifest, as these cases indicate, that if the courts must be called upon to decide every question involving discretion or judgment, that it will have work thrust upon it exceeding its capacity, and that the state will be greatly hampered in the ordinary administration of its every day affairs. While it may not be easy to point out the dividing line between powers that are so clearly judicial that they must be exercised by the courts and powers that pertain to the due administration of the laws by the executive and administrative officers of the state, we are confident that the powers conferred by this act belong to the latter class rather than the former.

The relators complain of the manner by which they were attempted to be brought before the commissioner. It seems that a notice in the form of subpoena was served upon them, reciting the contents of the complaint against them, and citing them to appear at a date named therein. It is urged that this is proceeding without statutory authority. But we think this is not a fatal objection. The statute, while not very clear, seemingly contemplates notice to the defaulting party, although no form of notice is prescribed by the act. This being true, any timely notice which informs him of the accusation against him and gives him an opportunity to defend against such accusation would be sufficient. The notice in this instance complied with these requisites.

Counsel representing interests adverse to the relators have, by leave of court, filed a brief in which it is contended that the statute of 1895, under which the relators purchased, was repealed by implication by the subsequent statutes relating to the sale and disposal of tide lands. A number of statutes, it is true, have been enacted since 1895 which relate to the sale and disposal of the tide lands of the state, but they relate to

tide lands generally and provide for the disposition of the state's fee in the same; while the statute here in question is limited and special, both as to the character of the tide lands to be conveyed and the purposes for which they may be conveyed. The rule is that a general statute does not repeal a special one, unless such is the plain legislative intent, even when they may contain somewhat inconsistent provisions. But here no such intent can be inferred. On the contrary, the inferences are all the other way. The general statutes in terms recite the acts intended to be repealed, and this special act is not enumerated, thus plainly negativing any intent to work its repeal. Moreover, the two acts can exist together, each operative in its own sphere without any necessary conflict.

We think the application for the writ should be denied, and it is so ordered.

PARKER and MOUNT, JJ., concur.

RUDKIN, J. (concurring)—I have grave doubts as to the validity of a statute conferring power on the commissioner of public lands to declare a forfeit of a grant of state lands for a breach of a condition subsequent. I also doubt whether prohibition will lie against that officer; but if so, I am convinced that this court has no original jurisdiction to grant the writ. *State ex rel. White v. Board*, 23 Wash. 700, 63 Pac. 532; *Winsor v. Bridges*, 24 Wash. 540, 64 Pac. 780; *State ex rel. Pelton v. Ross*, 39 Wash. 399, 81 Pac. 865. In *Winsor v. Bridges, supra*, the court said,

"We conclude that original jurisdiction to issue the statutory writ of prohibition against the board of state land commissioners to arrest their contemplated action in selling or leasing the lands in controversy is in the superior court, and not in this court, and we have no original jurisdiction in the premises, and for that reason we will not pass on the merits of the application. These can only be inquired into on appeal. The writ should be denied, for lack of original jurisdiction, and these proceedings dismissed."

For these reasons, I concur in the judgment denying the writ.

GOSE, J., concurs with RUDKIN, J.

[No. 9073. Department One. February 4, 1911.]

D. H. BUTTZ *et al.*, *Appellants*, v. HARL J. COOK *et al.*, *Respondents*.[1]

APPEAL—REVIEW—HARMLESS ERROR—OBJECTIONS TO EVIDENCE—PLEADING—ISSUES. In an action on contract for services, put in issue by a general denial, it is not error to refuse to strike evidence of a waiver by plaintiff of the contract, on motion made near the close of the trial, where much evidence of that nature had been admitted without objection.

PLEADINGS — ISSUES AND PROOF — GENERAL DENIAL. Waiver by plaintiff of a contract for services may be shown in an action for the services under a general denial, where the evidence tended to show that the services had not been performed.

APPEAL—REVIEW—HARMLESS ERROR — TENDER — CURING ERROR—VERDICT. Where a check was tendered plaintiff of the amount due, less interest, and was refused and held subject to defendants' order because it did not include interest, an offer to cash the check, made by defendants before judgment, cures any errors leading up to a verdict for the interest only.

SAME—EXCLUSION OF EVIDENCE. Error in the exclusion of evidence to show the joint liability of one of the defendants is harmless where the verdict was against such defendant.

Appeal by plaintiffs from a judgment of the superior court for Spokane county, Sullivan, J., entered January 7, 1910, upon the verdict of a jury rendered in favor of the plaintiffs, in an action on contract. Affirmed conditionally.

Davis & Davis, for appellants.

Post, Avery & Higgins, for respondents.

PARKER, J.—This is an action to recover compensation for services upon two causes of action. The wife is made a party,

[1]Reported in 113 Pac. 282.

evidently because of her community interest. In their first cause of action, the plaintiffs allege, in substance, that in February, 1905, the plaintiff D. H. Buttz was employed by Cook & Clarke to procure for them a man who would assist them in disposing of some sixty sections of Moxie Valley lands, situated in Yakima county, or a man who would purchase the lands, for which service they were to pay the plaintiff D. H. Buttz one thousand dollars; that thereafter, in April, 1905, the defendants Cook & Clarke organized the corporation Cook-Clarke Company, which corporation thereupon took over and assumed all of the assets and liabilities of Cook & Clarke, including their rights to these lands; that at the time the plaintiff D. H. Buttz undertook to procure a buyer or some person who would assist in disposing of the lands, Cook & Clarke had an option to purchase the same from the Yakima Land and Live Stock Company; that the plaintiff D. H. Buttz proceeded under his contract and succeeded in procuring one J. H. Rose to assist the defendants to dispose of the lands, and a contract was made accordingly between J. H. Rose and the defendants; that J. H. Rose did assist the defendants and did succeed in disposing of all of the lands in conformity with the agreement between the plaintiff D. H. Buttz and defendants Cook & Clarke, and that the plaintiffs' contract of service was thereby fully performed; for which judgment is asked in the sum of $1,000. The defendants, answering the cause of action, admit the existence of the Cook & Clarke partnership and the Cook-Clarke Company corporation, but deny all other allegations thereof.

In their second cause of action the plaintiffs allege, in substance, that the plaintiff D. H. Buttz was employed by Cook & Clarke as a salesman, and they agreed to pay him a commission of five per cent upon the sale price of any lands which they owned or had listed for sale for which he would find a purchaser; that the plaintiff D. H. Buttz thereafter sold a half section of land which the defendants had for sale, at the price of $3,840, upon which his agreed commissions was

$192, upon which has been paid $50, leaving a balance due of $142 and interest; that upon the organization of the Cook-Clarke Company corporation, this obligation was assumed by the corporation. Judgment upon this cause of action is asked in the sum of $142, and interest thereon from March 1, 1905. Answering these allegations, the defendants admit the sale by the plaintiff and the paying of $50 upon his commission, but allege that the commission of five per cent was to be paid only as the purchase price was paid upon the land, and that at the time of the commencement of the action only $500 had been paid upon the purchase price of the land, and that the plaintiff had received all he was then entitled to under his contract. A trial before the court and a jury resulted in a verdict and judgment in appellants' favor in the sum of $24.85. It is evident from the record, that this verdict was the result of the jury's concluding that the plaintiffs were not entitled to any recovery upon their first cause of action; that the $142 had been paid after the commencement of the action; and that the plaintiffs were entitled to the $24.85 as interest on the $142. From this judgment, the plaintiffs have appealed.

The first contention made by learned counsel for appellants is, in substance, that the court erred in admitting and refusing to strike out certain evidence which it is claimed by them tended to show that they had waived their right to commission under their first contract. This contention is based upon the absence of any such issue raised by the pleadings, the answer being a denial of the contract and service pleaded in the first cause of action. The objection to evidence of this nature was first made by appellants' counsel near the close of the trial, which lasted two days, and after considerable evidence along the same line had been introduced by respondents without any objection from appellants' counsel, and the motion to strike was made at the close of all the evidence. Even if this evidence was admitted upon the theory of waiver instead of that of the nonexistence of the contract service there-

under, it was not prejudicial error for the court to rule against appellants under the circumstances. We think, however, that the evidence objected to and sought to be stricken out tended to show that service was not rendered by appellant D. H. Buttz under the contract. This, in any event, rendered it admissible, and was evidently the ground upon which the learned trial court ruled.

After the commencement of this action in the superior court, and over a year before the trial, there was sent to appellant D. H. Buttz a check for $142, to apply on the commission alleged to be due appellants in their second cause of action. This check was never returned, but held by appellants until the trial, and then produced by the appellant D. H. Buttz and offered in evidence in connection with his cross-examination by counsel for respondents, when it was filed in the case as defendants' Exhibit Two, by consent of appellants. It will be noticed that this is the amount claimed by appellants, less interest, in their second cause of action. This check was sent to appellants by J. H. Rose, evidently at the instance of respondents. Appellant D. H. Buttz testified upon his cross-examination as to his receiving and holding this check as follows:

"Q. Has he not given you a check, signed by him, for that amount? A. I did not accept it, and I so wrote him. Q. You have the check yet, haven't you? A. I wrote him that I wouldn't accept the check; that I would hold it subject to his order, until he had paid it in full, $167.50, my demand, and I so notified him last August, in his office in Seattle. He asked me what I had done with that check in the presence of another party, and I said that I held it subject to his order. I told him this right in his office in the presence of Mr. Knuppenburg and Mr. Greenwall. Q. You are keeping the check all right, aren't you? A. Until he pays me, the Cook & Clarke Company owe me the money. Q. Wouldn't you take Mr. Rose's check? A. If Mr. Cook will give me the cash I will turn it over to him. I don't know if it is worth a dollar today. I am not going to take a check that I don't know it will ever be paid. Q. You didn't say that before, you said it

was because it was not for $167.50? A. I say today I don't know whether it will be paid or not. . . Q. And you have not tried to cash it? A. No, sir. Q. You in the meantime have written saying it was subject to his order, you didn't enclose it in the letter and sent it back to him? A. No, sir. Q. And you have not tried to cash it? A. No, sir. Q. And you told him the reason you had not done so was because it was not for a greater amount, that is for $167.50? A. Yes, sir. Q. What is the $167 for? A. Commissions and interest. Q. The difference between $167 and $142 is for interest? A. Yes, sir. Q. Then if that difference had been paid, added on to this check, that would settle it? A. Yes, sir. . . Q. (By Mr. Avery) It was given you for the purpose of paying you all or a portion of the amount due on the second cause of action in this complaint? A. Yes, sir."

Upon the hearing of their motion for new trial, counsel for appellants insisted that the court decide, as a matter of law, that the jury erred in failing to find for appellant in the sum of $142 in addition to the sum of $24.85, which was evidently found due to appellants as interest. Replying to this contention, counsel for respondents offered in their behalf to guarantee the payment of the check for $142, or to then and there pay to appellants the amount called for by the check. Several of appellant's assignments of error relate to certain instructions given and requested instructions refused, which it is argued erroneously led the jury to omit the $142 from their verdict. In view of the manner of the receiving and holding of the check by appellant D. H. Buttz, his failure to object to it save as to the amount, and the offer of respondents' counsel to cash the check, made upon the hearing of the motion for new trial, it seems to us that there could in no event be any prejudicial error in the actions of the court which are complained of as to giving or refusing instruction upon this branch of the case When appellants' counsel offered to pay this check upon the hearing of the motion for new trial, every possible error which caused the omission of that amount from the verdict was cured, even should it be considered that the receiving and holding of the check

by appellant D. H. Buttz in the manner testified to by him was not equal to an acceptance of it as a payment upon the amount claimed in the second cause of action. What possible injury could result to appellants from errors causing the omission of this $142 from the verdict when respondents offered to pay it in cash before the entering of the judgment? No action of the court could result in appellants' receiving any more than this $142 in addition to the verdict upon their second cause of action, for that is all they were seeking to recover thereon in addition to what the jury had already awarded them.

It is contended that the court erred in excluding certain offered evidence, which counsel for appellants claim tended to show that the corporation assumed the liabilities of the partnership, with which the appellant D. H. Buttz had made the contracts sued upon. This is another alleged error which in no event could be prejudicial to appellants, because, as we have noticed, the verdict and judgment, in so far as it is favorable to appellants, is against the corporation as well as the partnership. As to the first cause of action, the finding of the jury was in favor of the partnership; so of course the corporation could not be liable, since its liability was only because it had assumed the liabilities of the partnership. It is plain that appellants had the benefit of the corporation's assumed liability as fully as if such assumption on its part had been an admitted fact in the case.

We think the foregoing covers all the contentions of learned counsel for appellants requiring our discussion. We conclude that the judgment of the learned trial court should be affirmed, upon condition, however, that respondents pay, or cause to be paid, to appellants, or deposit with the clerk of the superior court, the sum of $142 for them, within thirty days after the filing of the remittitur therein upon this decision. It is so ordered, and the clerk of this court is directed to transmit to the clerk of the superior court with the remit-

titur the $142 check, being Exhibit Two of the statement of facts. Such check to be delivered to respondents upon the payment or deposit of the $142 as herein directed. Upon the failure to make such payment or deposit as directed, the superior court will award appellants a new trial.

RUDKIN, MOUNT, GOSE, and FULLERTON, JJ., concur.

[No. 9214. Department One. February 4, 1911.]

THE STATE OF WASHINGTON, *on the Relation of B. Schade Brewing Company, Plaintiff*, v. THE SUPERIOR COURT FOR SPOKANE COUNTY, *Henry L. Kennan, Judge, et al., Defendants.*[1]

EMINENT DOMAIN—PROPERTY SUBJECT—STREETS—FRANCHISE. A railway company cannot condemn from abutting lot owners the right to maintain tracks in a city street without a valid franchise from the city to the use of the street.

SAME—EXTENT OF POWER—STATUTES—CONSTRUCTION. Rem. & Bal. Code, §§ 8739, 8740, granting to railway corporations the right of eminent domain, do not authorize condemnation of land held in trust for the public as a city street, since the law must be construed to relate to private property only, in the absence of an express or implied authority to take public lands.

SAME—APPLICATION OF STATUTE. Rem. & Bal. Code, §§ 5717, 5718, in the act conferring the right of eminent domain upon corporations organized for the construction of any railway, macadamized road, plank road, clay road, canal, or bridge, and which authorize any company "herein mentioned" to appropriate any part of a public road or street, upon terms to be agreed upon by the county commissioners or city authorities, if the parties can agree on the terms on which the same may be appropriated, used or occupied, and if unable to agree, then such corporation may appropriate so much as may be necessary without any such agreement, do not authorize a railway company to appropriate a part of a city street; but the sections apply only to road and toll companies occupying the street with the public, in view of Id., § 5719, which provides that where such highways are taken by agreement with the local authorities, the corporation may place gates thereon and receive

[1]Reported in 113 Pac. 576.

such tolls as the local authorities consent to, and if appropriated without such agreement, no gates or other obstructions shall be placed on the public roads or tolls charged.

MUNICIPAL CORPORATIONS — STREETS — RAILROADS — OBSTRUCTIONS AND USE—POWER OF CITY—STATUTES—CONSTRUCTION. The right to occupy a public street to the exclusion of the public cannot be granted to a railroad company by a city, under Rem. & Bal. Code, § 7507, providing that the city may authorize the locating and construction of any railroad in any street and prescribe the terms; nor under Id., § 7479 granting practically the same powers to cities of the first class by an act entitled an act granting "additional authority" as to the location of railroads, in, along, over or across any street, which act regulates the granting of franchises for such use of the streets without giving any material additional powers.

SAME—STREETS—FRANCHISES — POWER TO GRANT — VACATION OF STREETS. A franchise to a railroad company to occupy a part of a public street to the exclusion of the public cannot be upheld under the city's power to vacate the street, when it was not exercised in the manner prescribed by Rem. & Bal. Code, §§ 7840-7843, for such vacations.

SAME. A city of the first class is not authorized to grant a franchise to a railroad company to encroach upon or use a material portion of a city street to the exclusion of the public therefrom.

STATUTES—CONSTRUCTION—TITLE OF ACT. An act entitled an act "granting additional power" is not to be construed as granting any additional power where its provisions do not do so.

MUNICIPAL CORPORATIONS — STREETS — FRANCHISES — STATUTORY AUTHORITY. Power to authorize the location of a railroad "in" a street does not imply or mean power to grant an exclusive right to use the street.

SAME. Power to alter streets, change grades, and exercise general control over streets, does not include the power to surrender the use of any part of the surface thereof.

SAME. Power to grant to a railroad company the right to tunnel under, and use land under the surface of the street, does not include the right to grant the exclusive use of a part of a street for the purpose of descending to the grade under the street.

Certiorari to review a judgment of the superior court for Spokane county, Kennan, J., entered October 20, 1910, adjudging a public use and necessity in condemnation proceedings. Reversed.

Turner & Geraghty and *Graves, Kizer & Graves*, for plaintiff.

H. H. Field and *F. M. Dudley*, for defendants.

PARKER, J.—The relator has brought here by a writ of review, and seeks to have reversed, findings of necessity and an order for trial to assess damages against it, made by the superior court for Spokane county in an eminent domain proceeding instituted in that court, in which proceeding the Chicago, Milwaukee & Puget Sound Railway Company seeks to condemn property rights of the relator as the owner of lots abutting upon Front avenue in the city of Spokane. The facts shown by the record are undisputed, and so far as necessary for us to notice them, they may be briefly summarized as follows: The relator is the owner of lots abutting upon the northerly side of Front avenue, a public street in Spokane, having a frontage on that avenue of approximately three hundred and twenty-five feet. The railway company proposes to construct in that portion of Front avenue upon which the relator's lots abut, and on other portions thereof, a double track railway. It is proposed to construct these tracks in a cut so that they will be from thirteen to twenty-two feet below the level of the surface of the avenue. This cut is to be thirty-two feet wide and its sides supported by walls of masonry which are to extend up to the surface of the street. Along on the top of the walls in front of the relator's property is to be constructed a substantial iron fence, so as to effectually exclude the public from that portion of the avenue occupied by the cut and the track. The cut on that portion of the avenue will not be deep enough to admit of maintaining the street surface over it without interfering with the operation of the railway, as it will be elsewhere along the avenue where the street surface will be maintained. The cut will occupy nearly the entire south half of the avenue, leaving the north half, upon which the relator's property immediately abuts, undisturbed.

Prior to instituting the eminent domain proceedings by the railway company to acquire the right to maintain and inclose this cut as against abutting property, the city of Spokane, by ordinance, granted to the railway company a franchise to occupy Front avenue in the manner we have described. This ordinance contained a proviso that the railway company should not occupy the portion of the avenue here involved until it had fully compensated the owners of property abutting thereon for any damages sustained to such property by reason of the construction of the railway in this manner. To the end that its right to proceed with the construction of its railway under this franchise might be perfected, it instituted condemnation proceedings against the relator. Upon the preliminary hearing, counsel for the relator objected to the court's making any finding of necessity or order for assessing damages, upon the ground, in substance, that the city has no power to grant to the railway company the right to occupy the avenue in front of relator's property in the manner contemplated. This objection was overruled, when finding of necessity and an order directing a trial to assess damages were entered. These are the rulings which are here sought to be reversed.

It is at once apparent that the right of the railway company to condemn the property rights of the relator depend upon the right of the railway company to occupy the avenue in the manner proposed, as against the public. If the railway company has not acquired by lawful grant the right to occupy the avenue in this exclusive manner as against the right of the public to use it as a street, then it follows that the railway company cannot acquire the relator's rights therein as an abutting owner by eminent domain proceedings. Otherwise the railway company could exercise the right of eminent domain to acquire the relator's property rights in the avenue, to the end that a nuisance might be maintained therein by the railway company. This plainly is not the law. *State*

ex rel. Sylvester v. Superior Court, 60 Wash. 279, 111 Pac. 19.

We are not here confronted with any question touching the manner of the passage of this franchise ordinance; neither is there any uncertainty as to its terms, which plainly indicate an intention on the part of the legislative power of the city to grant to the railway company the right to occupy substantially one-half of the avenue in front of the relator's property, to the entire exclusion of the public therefrom. The problem for our solution then is, has the state, by legislative enactment, delegated to cities of the first class, to which class Spokane belongs, the power to grant by ordinance such franchise and privilege as this ordinance in terms assumes to grant to the railway company in this avenue. Learned counsel for the railway company have called to our attention two classes of legislative enactments which are relied upon by them in support of their contention that the city possesses ample power to make this grant. First, railway legislation; and second, municipal legislation. The first class has to do with the rights of certain public service corporations to occupy public highways with or without the consent of the local authorities, as is contended by counsel for the railway company; while the second class relates to the granting by cities of the first class of franchises to railway companies to lay their tracks in the streets of such cities. We will notice these in order.

In 1873, the territorial legislature passed an act entitled "An act to provide for the formation of corporations." Laws of 1873, p. 398, 411. This was an original act complete within itself, so we ignore previous acts upon the subject. This act, among other things, provided for the exercise of the right of eminent domain, and the acquiring of rights of way by public service corporations. As to the matters here involved, this act does not appear to have ever been changed or superseded, save by amendments, by reference to its sections as therein numbered, or as those sections and

their amendments have been numbered in the Code of 1881, Hill's Code, or Ballinger's Code. Relying upon this fact, learned counsel for the railway company invoke the provisions of this act and its amendments as a single law upon the subject, to the end that the several sections of law here relied upon to support the railway company's right to acquire the use of this avenue in this exclusive manner may be construed accordingly, though they are not found together in Remington and Ballinger's Code. The original act was divided into chapters, each having a separate series of numbered sections, chapter 3 being the part here involved. So when we refer to a section number it will mean that numbered section of chapter 3 of the act, unless otherwise designated. We think the following are all the provisions of that law which can possibly aid the railway company.

Section 1, as amended, being Rem. & Bal. Code, § 8739, provides:

"A corporation organized for the construction of any railway, macadamized road, plank road, clay road, canal or bridge, shall have a right to enter upon any land, real estate or premises, or any of the lands granted to the state of Washington for school, university, or other purposes, between the termini thereof, for the purpose of examining, locating and surveying the line of such road or canal, or the site of such bridge, doing no unnecessary damage thereby."

Section 2, as amended, being Rem. & Bal. Code, § 8740, provides:

"Every corporation organized for the construction of any railway, macadamized road, plank road, clay road, canal or bridge, is hereby authorized and empowered to appropriate, by condemnation, land and any interest in land or contract right relating thereto, including any leasehold interest therein and any rights-of-way for tunnels beneath the surface of the land, and any elevated rights-of-way above the surface thereof, including lands granted to the state for university, school or other purposes, and also tide and shore lands belonging to the state (but not including harbor areas), which may be necessary for the line of such road, railway or

canal, or site of such bridge. . . . And provided further, that if such corporation locate the bed of such railway or canal upon any part of the track now occupied by any established state or county road, said corporation shall be responsible to the county commissioners of said county or counties in which such state or county road so appropriated is located, for all expense incurred by such county or counties in relocating and opening the part of such road so appropriated."

By the Laws of 1888, p. 64, there was added to this law a section to be known as § 2456¾ of the Code of 1881, which as amended, being Rem. & Bal. Code, § 8737, provides:

"Every corporation formed under the laws of this state for the construction of railroads or canals shall possess the power to construct its railway or canal, as the case may be, across, along or upon any river, stream of water, watercourses, plank road, turnpike or canal, which the route of such railway or canal shall intersect or touch; but such corporation shall restore the river, stream, watercourse, plank road or turnpike thus intersected or touched to its former state as near as may be, and pay any damages caused by such construction. . . ."

Section 3, being Rem. & Bal. Code, § 8738, provides:

"Any corporation may change the grade or location of its road, or canal, not departing from the general route specified in the articles of incorporation, for the purpose of avoiding annoyances to public travel or dangerous or deficient curves or grades, or unsafe or unsubstantial grounds or foundation, or for other like reasonable causes. . . ."

Section 4, being Rem. & Bal. Code, § 5717, provides:

"When it shall be necessary or convenient in the location of any road herein mentioned to appropriate any part of any public road, street, or alley, or public grounds, the county court [commissioners] of the county wherein such road, street, alley or public grounds may be, unless the same be within the corporate limits of a municipal corporation, is authorized to agree with the corporation constructing the road, upon the extent, terms, and conditions upon which the same may be appropriated or used and occupied by such corporation, and if such parties shall be unable to agree thereon,

such corporation may appropriate so much thereof as may be necessary and convenient in the location and construction of said road."

Section 5, being Rem. & Bal. Code, § 5718, provides:

"Whenever a private corporation is authorized to appropriate any public highway or grounds, as mentioned in the last section, if the same be within the limits of any town, whether incorporated or not, such corporation shall locate their road upon such particular road, street, or alley, or public grounds within such town, as the local authorities mentioned in the last section and having charge thereof shall designate; but if such local authorities shall fail or refuse to make such designation within a reasonable time when requested, such corporation may make such appropriation without reference thereto."

Section 6, being Rem. & Bal. Code, § 5719, provides:

"Whenever such public highway or grounds are taken by a private corporation by agreement with the local authorities mentioned in the last preceding section, such corporation may place such gates thereon and charge and receive such tolls thereat as such local authorities may consent to by such agreement, and none other; but when the same is appropriated without such agreement, as provided in said section such corporation shall not place any gate or other obstruction upon the public highway or grounds appropriated, nor charge or receive any toll from any person passing over or along the same."

This last section is not quoted or relied upon by counsel for the railway company as all the others are, but as we proceed we think it will be found to lend material aid to a proper construction of the other sections. The Laws of 1869 are referred to by the compilers of Rem. & Bal. Code as the first enactment of this law, but it will be found re-enacted with some change in 1873, as we have cited.

It is contended by learned counsel for the railway company, in substance, that the term "land" as used in §§ 1 and 2, as descriptive of the property subject to appropriation, includes land already devoted to a public use, as a state or

county road; that the demands of railway companies for rights of way are by this law deemed superior to the necessities of such highways; that such highways may be so appropriated with or without the consent of the county authorities; and that by virtue of § 5, the same right of appropriation is given as to streets in cities and towns. In *Seattle & M. R. Co. v. State*, 7 Wash. 150, 34 Pac. 551, 38 Am. St. 866, 22 L. R. A. 217, it was sought to condemn a right of way for the railway over tide lands belonging to the state. The right to do so was based upon §§ 1 and 2 of this act, there referred to as §§ 1569 and 1570 of Hill's Code. Disposing of this contention, the court said:

"The state appeared by the attorney general, and moved to dismiss the proceeding as against it, on the ground that the court had no jurisdiction to entertain it, which motion was denied. We think the court erred in its ruling on this point, for the following reasons: The state is the owner of this land, and there is no authority, either express or implied, in the statutes for the taking of any part of it through exercise of the power of eminent domain. Our eminent domain act, as applied to railroads (Gen. Stat., §§ 1569-70; Code Proc., title 9, chap. 5), must be construed, as are all such acts, as having regard only to the taking of private property, unless there is either express or clearly implied authority to extend them further. Lewis, Em. Dom., § 273; *State v. Anthoine*, 40 Me. 435; *Marblehead v. Commissioners*, 5 Gray, 451; *Charlestown v. Commissioners*, 3 Metc. 202; *Stevens v. Erie Ry. Co.*, 21 N. J. Eq. 259."

At that time this law did not in terms enable the acquisition of a railway right of way over state lands as the amendments since then do, by specifically naming "lands granted to the state for university, school or other purposes, and also tide and shore lands belonging to the state." Rem. & Bal. Code, § 8740. No amendments, however, have been made which in any manner enlarge the power given in this law to acquire the right by a public service corporation to occupy public highways. It would seem that, if the word "land," as descriptive of property which might be so ac-

quired by a railway company, did not then mean tide land which the state held with the power of sale, practically as a private owner, it could hardly mean land held by the state in trust for the public as a public highway. This would seem to dispose of the railway company's contentions, in so far as its attempted acquisition of the use of this avenue in this exclusive manner may be regarded as being based upon the right of eminent domain as against the public. That decision has since then been cited with approval by this court in the following cases: *North River Boom Co. v. Smith*, 15 Wash. 138, 45 Pac. 750; *Samish Boom Co. v. Callvert*, 27 Wash. 611, 68 Pac. 367; *State ex rel. Trimble v. Superior Court*, 31 Wash. 445, 72 Pac. 89, 66 L. R. A. 897; *State ex rel. Attorney General v. Superior Court*, 36 Wash. 381, 78 Pac. 1011. Just what right the railway company may have under the proviso of § 2 to the use of state or county roads, we need not now determine, since that proviso relates only to the occupancy of such roads. We are not able to see that it has anything to do with city streets.

Let us now turn to the rights claimed by the railway company under §§ 4, 5, and 6. The right of public service corporations to occupy streets under these sections, if such right exists at this time by consent of the council, is more in the nature of a franchise right than a right of eminent domain. It is a franchise right to be granted by the local authorities, or, if exercised without their consent, may be considered as a franchise granted direct by the state, but without the right to collect toll on the part of the public service corporation exercising such right. We are not concerned here with the right of any public service corporation save that of a railway company. The fact that a public service corporation organized for the purpose of maintaining a "macadamized road," "plank road" or "clay road," as named in § 1, may, under this law, have the right to "appropriate" a portion of a street, does not necessarily mean that

a railway company has any such right. Nor does it necessarily mean that even such road corporation can occupy a part of a public road or street to the exclusion of the public therefrom, notwithstanding the word "appropriate" is used to designate such occupancy. Now, it will be noticed that § 4 refers only to "any road herein mentioned." This means, of course, any road operated by some public service corporation which may appropriate some part of a public road outside the limits of a municipal corporation, with or without the consent of the county court. Section 5 purports to give the same right to the same corporations to appropriate parts of streets "within the limits of any town." If we proceeded no farther, it might well be argued that the word "road" used in these two sections does not include "railway" or "railroad." But when we proceed to § 6, a part of the same law, it seems to us that it becomes clear that this use of the streets was not intended to be given to railway companies in towns. Section 6 refers to the use which may be made of the parts of public roads and streets appropriated by corporations, and so limits that use as to render it clear that none but toll road companies were to have such right of appropriation under §§ 4 and 5. It is hardly conceivable that the provision relating to the maintaining of gates and charging toll has any reference to a railway corporation's use of roads or streets, yet such provisions would apply to railway corporations if such corporations are given rights of appropriation, by virtue of §§4 and 5. It is worthy of note in this connection that the word "railway," not "railroad," is used in §§ 1 and 2, while the word "road" is used in connection with "macadamized" "plank" and "clay," and in § 4, it is "any road herein mentioned" that may occupy a portion of a public highway.

It is insisted that the use of the word "appropriate" indicates an intention to allow the appropriation of public roads and streets to the entire exclusion of their use by the public as such, if desired by the corporation seeking their use, and

hence must apply to railways as well as to other corporations. This contention, however, cannot prevail, in view of the limitations in § 6 touching the manner of use by the appropriating corporation, though the word "appropriate" may ordinarily have a somewhat broader meaning. In view of the fact that this law in terms refers only to public highways outside "the corporate limits of a municipal corporation" and those "within the limits of any town," it might be argued that in no event could it apply to streets in a city of the first class. No such municipal corporation as our cities of the first class, either in size or organization, existed in the territory at the time of the original passage of this law in 1873, and §§ 4, 5, and 6, which we have been discussing, have not been amended since then. However, since counsel have made no contention upon this ground, we express no opinion as to possibility of the law being applicable to the public streets of such cities. Nor is it at all likely that there will ever be occasion to attempt the exercise of any such right by a toll road corporation in such a city. We are of the opinion that a railway company cannot acquire under this law any right to occupy any portion of a public street in a city of the first class, either with or without the consent of the legislative authority of such city. The authorities hereafter cited in support of our conclusions upon the railway company's claims under other statutes lend support to this view.

We now turn to the second class of legislation relied upon by learned counsel for the railway company. These statutes have to do with the powers of cities of the first class and the powers of their councils. This expression, suggesting a difference in these powers, we use advisedly. We will have occasion to notice this difference as we proceed. Many provisions of the statutes conferring powers upon such cities and their councils have been called to our attention, but we think the following are all that can possibly lend any support to the claims of the railway company. In 1890 the legislature

passed an act to provide for the government of cities having a population of twenty thousand or more inhabitants, enabling such cities to frame charters for their own government. The purpose of this act was to give effect to § 10, article 11, of the constitution. The powers given by this act were conferred upon the people of the cities rather than upon their councils or officers. It has been appropriately referred to by the courts and the bar as the "enabling act." Section 5 of this act, being Rem. & Bal. Code, § 7507, provides:

"Any such city shall have power . . .

"(7) To lay out, establish, open, alter, widen, extend, grade, pave, plank, establish grades, or otherwise improve streets, . . . and to regulate and control the use thereof, and to vacate the same. . . .

"(8) To change the grade of any street, highway or alley within its corporate limits, and to provide for the payment of damages to any abutting owner or owners, . . .

"(9) To authorize or prohibit the locating and constructing of any railroad or street railroad in any street, alley, or public place in such city, and to prescribe the terms and conditions upon which any such railroad or street railroad shall be located or constructed; to provide for the alteration, change of grade, or removal thereof . . ."

Cities of twenty thousand or more inhabitants are by statute designated as cities of the first class. Rem. & Bal. Code, § 7479. So this act is applicable to Spokane. In 1907 the legislature passed an act as follows:

"An Act granting additional authority to cities of the first class to authorize the location, construction and operation of railroads in, along, over or across any highway, street, alley, or public place, and to prescribe the duration and condition of such use, notwithstanding any charter provisions limiting the term of franchise, or concerning the acquisition by any such city of the property of companies holding any franchise, privilege, license, grant or authority, and declaring an emergency.

"Be it enacted by the Legislature of the State of Washington:

"Section 1. Any city of the first class shall have the power

by ordinance to authorize the location, construction and operation of railroads in, along, over and across any highway, street, alley or public place in such city, for such term of years and upon such conditions as the city council of such city may by ordinance prescribe, notwithstanding any provisions of the charter of such city limiting the terms of franchises, or requiring such franchises to contain a provision that such city shall at any time have the right to appropriate, by purchase, the property of the corporation receiving any franchise, license, privilege or authority: Provided, however, That nothing herein contained shall be construed as applying to street railroads or railroads operated in connection with street railroads, in and along the streets of such city." Laws of 1907, p. 57; Rem. & Bal. Code, § 7510.

It is strenuously argued that these statutes confer upon the city council the power to grant to the railway company the exclusive use of a portion of this avenue in the manner contemplated by this ordinance. If this power is vested in the council, then by the mere passage of an ordinance to that effect, any street in any city of the first class can be surrendered wholly to any railway company to the entire exclusion of ordinary highway travel, and its use as a public highway thus be absolutely destroyed. The most important metropolitan thoroughfare in the state would have to yield its life as a public street to this power if the city council sought to exercise it. Of course, it is conceded that the power could be made effective only upon rendering compensation to owners of abutting property. This, however, only touches the private rights involved. Before the question of compensation for the interference with such rights can be made the subject of inquiry in an eminent domain proceeding, it must clearly be made to appear that the power can be exercised *against the right of the public to use the street as a public highway.* The fact that only half of this avenue is here sought to be devoted to a purpose which prevents the use of that portion as a street is of no consequence in this inquiry, for this is a question of power, and the power which can thus take such portion can take all. These observations, we concede, do

not show a legal reason for saying the legislature has not granted to the city council this power; but they do suggest that only by clear and unmistakable language of legislative enactment will we be warranted in holding that such power exists in the council.

It will be well to here notice that this is not a vacation ordinance. It is not seriously so contended and could not be. It is true that in subdivision 7 of § 7507, above quoted, the power to vacate appears to have been given, but that power must now be exercised as provided by Laws of 1901, p. 175 (Rem. & Bal. Code, §§ 7840-7843), and it is not pretended that this law has been complied with in the passage of this ordinance. It is evident that the power here sought to be exercised is a franchise power, and is not a vacation power. What then are the rights of the public in this avenue as against the exercise of such a power? Let us notice some elementary principles touching this right of the public. In Elliott, Roads and Streets (2d ed.), § 645, the learned authors say:

"'Public highways belong, from side to side and end to end, to the public,' and any permanent structure or purpresture which materially encroaches upon a public street and impedes travel is a nuisance *per se*, and may be abated, notwithstanding space is left for the passage of the public. This is the only safe rule, for, if one person can permanently use a highway for his own private purposes, so may all, and if it were left to the jury to determine in every case how far such an obstruction might encroach upon the way without being a nuisance, there would be no certainty in the law, and what was at first a matter of small consequence would soon become a burden not only to adjoining owners, but to all the tax-payers and the traveling public as well. Thus expediency forbids any other rule. But even if it did not, the rule is well founded in principle, for it is well settled that 'the public are entitled, not only to a free passage along the highway, but to a free passage along any portion of it not in the actual use of some other traveler,' and if this be true it necessarily follows that there can be no rightful permanent use of the way for private purposes."

In 2 Dillon's Municipal Corporations (4th ed.), § 660, that learned commentator says:

"The king cannot license the erection or commission of a nuisance; nor in this country can a municipal corporation do so by virtue of any implied or general powers. A building, or other structure of a like nature, erected upon a street without the sanction of the legislature, is a nuisance, and the local corporate authorities of a place cannot give a valid permission thus to occupy streets without express power to this end conferred upon them by charter or statute."

Commenting upon the nature of this right of the public to have the use of the whole of the street for highway purposes, the supreme court of Illinois in *Smith v. McDowell ex rel. Hall*, 148 Ill. 51, 68, 35 N. E. 141, 22 L. R. A. 393, speaking through Justice Shope, said:

"The permanent encroachment upon a public highway or street unauthorized by the legislature, and the creation of a purpresture therein, which obstructs the free and uninterrupted passage of the public, is, as a matter of law, a public nuisance. The matter of inconvenience to the public, or that sufficient of the street may remain unobstructed to still accommodate the public travel, cannot be considered. The trustee of the public,—the municipality,— is charged with the duty of keeping and maintaining the streets, in all their parts, open and unobstructed, and in reasonably safe condition for the public use. No question of the amount of damage done or that may ensue from the creation of the purpresture is raised, nor can it be considered in proceedings by the public, the question being, simply, whether there has been an invasion of the public right."

A vast array of authorities could be cited in support of this doctrine. It has become elementary. This being the nature and extent of the right of the public to use this avenue, we recur to the question, Has that right been lawfully surrendered to the railway company by this ordinance? An instructive opinion bearing upon this question was rendered by the court of appeals of New York in *Delaware, L. & W. R. Co. v. Buffalo*, 158 N. Y. 266, 53 N. E. 44. It there ap-

pears that the city council had granted permission to the railroad company to construct an overhead crossing over a street of the city. Accordingly the crossing was constructed, resting upon permanent piers placed in and occupying about one-half the width of the street. Thereafter a controversy arose between the railroad company and the city as to the right of the company to maintain the piers in the street. The court construed the terms of the grant by the council as not including the right to so maintain the piers, which was one of the questions involved, but also placed its holding against the railroad company upon the broader ground of want of power in the council to grant such permission, saying:

"It is true that railroad companies are authorized to construct their roads across, along, or upon any street or highway in a city with the assent of the municipal authorities. That is simply a general authority to cross streets with the consent of the local authorities. When a railroad company relies upon a legislative act as a justification for an encroachment upon public or private rights, or, as in this case, as a justification for the occupation with its piers and abutments of a public highway, it must show that the statute authorized in express terms or by clear and unquestionable implication the doing of the very acts complained of, or that the statute was imperative, and could not be executed without causing a nuisance. The plaintiff had general legislative authority to cross the street in question, but it had no express authority to occupy a large portion of the public highway with abutments and piers for the support of its structure, to the great inconvenience and detriment of the public. Nothing less than express authority to place these obstructions in the street will shelter the plaintiff from the consequences of creating a nuisance by the obstruction of a public highway."

In *Lake Shore & M. S. R. Co. v. Elyria*, 69 Ohio St. 414, 69 N. E. 788, the supreme court of Ohio dealt with a similar situation. The statute relied upon as conferring power upon the council to grant such occupancy of the street, among other things, provided:

"'If it be necessary, in the location of any part of a railroad, to occupy any public road, street, alley, way, or ground of any kind, or any part thereof, the municipal or other corporation, or public officers or authorities, owning or having charge thereof, and the company, may agree upon the manner, terms, and conditions upon which the same may be used or occupied; and if the parties be unable to agree thereon, and it be necessary, in the judgment of the directors of such company, to use or occupy such road, street, alley, way, or ground, such company may appropriate so much of the same as may be necessary for the purposes of its road, in the manner and upon the same terms as is provided, for the appropriation of the property of individuals. . . .'"

Referring to this provision, the court said:

"Does it authorize the council to grant to a railway company the *exclusive* and permanent right to occupy a public street or part of it at a crossing or elsewhere? Or does it merely authorize a joint occupancy? We have no doubt that the General Assembly, representing the sovereignty of the state, may empower municipal councils to make the larger grant and confer the exclusive use, but has it done so by the foregoing legislation? We think not. To establish, lay out, and open up a county road or a public street, the statutes have made clear and distinct provisions, and, when the road or street is no longer of public use or utility, provisions equally clear and distinct are made for their vacation, of all which public records are made, and we find nowhere any other method of vacating such public highway or any part of it. By the proper establishment and opening of the street, the village or city becomes vested with the full title thereto, in trust for the public, and it is not within the delegated powers of the municipal council to barter or grant away such title except in the mode provided for the purpose. In the liberality of our laws, and in proper recognition of the necessities and benefits of railroad enterprises, a joint use is permitted, and the railway company, in a manner, and upon such terms and conditions as it and the council may agree, may occupy a road, street, alley, way, etc. But its occupancy must not extinguish the prior title and use, and permanently exclude the public. It cannot destroy the dominant right of the public. To authorize the council, the municipal authorities,

to grant more than a joint occupancy, requires clear and express language in the statute to that effect, and which we do not find in the section."

A great many decisions of the courts could be cited in support of these views. Among others we note the following: *City of St. Paul v. Chicago M. & St. P. R. Co.*, 63 Minn. 330, 63 N. W. 267, 65 N. W. 649, 68 N. W. 458, 34 L. R. A. 184; *Chicago, R. I. & P. R. Co. v. People*, 222 Ill. 427, 78 N. E. 790; *Ligare v. Chicago*, 139 Ill. 46, 28 N. E. 934, 32 Am. St. 179; *Lockwood v. Wabash R. Co.*, 122 Mo. 86, 26 S. W. 698, 43 Am. St. 547, 24 L. R. A. 516; *State v. Mayor of Jersey City* (N. J.), 18 Atl. 586; *Warren R. Co. v. State*, 29 N. J. L. 353; *Barney v. Keokuk*, 94 U. S. 324, 342. This court recognized the soundness of these views in *State ex rel. Spokane & British Columbia Telephone & Telegraph Co. v. Spokane*, 24 Wash. 53, 63 Pac. 1116, though the question was not there directly involved. At page 59 it is said:

"The primary purpose for which highways and streets are established and maintained is for the convenience of public travel. The use of such highways and streets for water mains, gas pipes, telephone and telegraph lines is secondary and subordinate to the primary use for travel, and such secondary use is permissible only when not inconsistent with the primary object of the establishment of such ways."

Of course, the use of a street for a railway is secondary and subordinate to the primary use it is intended for, the same as the uses mentioned by the court in that case were secondary to such primary use.

We will not attempt to follow learned counsel for the railway company through the details of their voluminous and elaborate brief. We believe the application of the principles of law shown to exist by the authorities we have reviewed and cited are sufficient to demonstrate that the power is not given to the city council by the statutes relied upon to grant to the railway company the exclusive use of a portion of Front avenue as contemplated by this ordinance. We will, however,

notice some other matters to which counsel have particularly directed our attention.

It is insisted that since by the title of the act of 1907 Rem. & Bal. Code, § 7510, it purports to be an act granting "additional authority" to cities of the first class, it was evidently intended thereby to give to such cities greater power than they already possessed. It is pointed out that the enabling act of 1890 (Rem. & Bal. Code, § 7507), gives the power to the cities to authorize the location and construction of railroads in streets; from which it is argued that the passage of the 1907 act would be to no purpose unless it be held to give the city some additional power. This supposed additional power, it is contended, consists of power to grant to railway companies some greater rights in their occupancy of the streets than could be granted under the power of the city possessed by virtue of the enabling act of 1890. There appears no basis for this contention other than the mere fact of the words "additional authority" being found in the title of the later act. When we turn to the body of the act we find the grant of power given by rather more words than in the act of 1890, but we are not able to see that it is any more comprehensive. The only difference in the words indicating what privilege may be granted by the council is that by the act of 1890 there may be granted the right to locate and construct a railroad "in any street"; while by the act of 1907 there may be granted the right to locate and construct a railroad "in, along, over and across any highway." It is in these additional words, in connection with the title of the act of 1907, that counsel seem to see greater power conferred upon the city than in the grant of power in the enabling act of 1890.

Now, it seems to us that there is a fundamental difference in the two grants of power that, when recognized, will at once render plain the purpose of the enactment of the latter. The act of 1890 was passed before there were any cities with freehold charters, as such charters are commonly called; that

is, charters framed by the people of the cities. That act did not grant power to the councils of such cities or to any of the officers of such cities. It granted power to the cities. This power was left to the cities to be exercised in such manner as the people thereof might provide by their charter. They were free to put upon their councils such limitations as they deemed wise, so far as that act is concerned. Indeed, it is not difficult to see that the council might, by the provisions of a charter adopted by the people, be entirely prohibited from exercising any power to grant railroad privileges in the streets, so far as that act is concerned. We take judicial notice of the fact that, in at least some of these cities, the power of the council was very much limited in the exercise of this power. It was only by a general law, such as this act of 1907, that such charter restrictions could be removed. In the body of this act of 1907 we find that this franchise power is granted to cities of the first class to be exercised "by ordinance." This, of course, means by the city council, and as the act provides, "notwithstanding any provisions of the charter of such city limiting the terms of franchises." Here, then, we have an additional power granted, not to the city in the sense in which the power was granted by the enabling act of 1890, but to the city council—a power which the council would not necessarily possess without restriction under the city charter—a power which, indeed, the council might not possess at all under the city charter. It is evident that this power is additional only in this sense, unless it can be said it is additional because of the use of the words "in, along, over, and across," instead of the word "in" standing alone as it does in the enabling act of 1890.

Some contention is made that the word "in" must be presumed to have been used to express something not expressed by the words "along, over, and across." It is suggested that the word "in" appropriately describes the construction of a railway as this is proposed to be constructed. If rules of legal construction, as counsel insist, require us to look for a

meaning for this word not covered by the others, it could as well be suggested that it means in the street low enough to admit of preserving the surface so as not to interfere with the use of the street by the public, as to attribute to the word the meaning suggested by counsel. No authorities have been called to our attention indicating that the word "in," as here used for the purpose of describing the nature and extent of a power to grant a railway franchise in a street, has ever been held to mean that any part of the surface of a street could be entirely taken from public use as a highway by virtue of such power. The following authorities, cited by counsel, are in point upon questions similar in their nature to this, but do not militate against the soundness of our conclusions. *State v. Newport St. R. Co.*, 16 R. I. 533, 18 Atl. 161; *Cook County v. Great Western R. Co.*, 119 Ill. 218, 10 N. E. 564; *New York L. & W. R. Co. v. Roll*, 32 Misc. Rep. 321, 66 N. Y. Supp. 748; *Re People's Rapid Transit Co.*, 125 N. Y. 93, 26 N. E. 25, 10 L. R. A. 728.

Counsel for the railway company make some contentions based upon provisions of these laws giving power to the city to alter streets, to change the grade of streets, and other provisions evidencing the city's general control over streets. We will not follow counsel through these contentions, deeming it sufficient to say that, in our opinion, none of these provisions indicate any grant of power to surrender the use of streets or any part of the surface thereof to any purpose, using the language of this court in *State ex rel. Spokane & British Columbia Telephone & Telegraph Co. v. Spokane*, *supra*, "inconsistent with the primary object of the establishment of such ways," that is, inconsistent with their use as public highways.

It is suggested that this inclosed part of the surface of the avenue is to be used in such a manner as to enable the railway to descend to a grade sufficiently low to not interfere with the surface of the avenue along other portions thereof, and that since the power to grant the use of the avenue under the sur-

face is given, the surface may be used for the purpose of reaching such grade under the surface. This argument might have some weight if there were no other ways of reaching a proper grade under the surface of streets. But manifestly it is as easy to pass from private property under a street surface as it is to pass from private property to the surface of the street. We think this lends no support to counsel's contentions.

It seems to us that a railway company given the use of a public street, under the powers of the city council here invoked, must be given that use, if it is to occupy any of the surface of the street, upon substantially the same terms as any other traveler upon such street may use it; that is, a free passage along the portion of the street surface so granted, when it is not in the actual use of some other traveler. Such railway company may have some superior rights under, and some exemptions from the requirements of, the law of the road, because of the fact that its trains cannot turn from off its tracks; but it cannot acquire by any grant from the city council, without plain legislative authority therefor, any greater right to permanently occupy any portion of the street surface so as to obstruct public travel thereon than any other person or traveler can acquire. We are of the opinion that the city council of the city of Spokane does not have the power to grant to the railway company the right to occupy Front avenue in front of relator's property in the exclusive manner contemplated by this ordinance. It follows that the railway company does not possess the power to condemn the property rights of the relator sought to be acquired in the condemnation proceeding. The findings of necessity and order of trial to assess damage, made in that proceeding against the relator, are reversed and set aside.

RUDKIN, FULLERTON, and GOSE, JJ., concur.

[No. 9053. Department Two. February 7, 1911.]

Lettie Wilkinson, *Appellant*, v. Augusta Bergquist, *Respondent*.[1]

Principal and Agent—Notice to Agent—Existence of Relation—Evidence—Sufficiency. In an action to foreclose a chattel mortgage, brought against a vendee of the property who had assumed payment of the notes secured by the mortgage, the vendee is bound by the notice and the knowledge of a person employed by the vendee to represent her in securing the mortgagee's consent to the sale and to ascertain the amount due on the notes and mortgage assumed by her, even if such person had acted as a broker or agent for the vendor in effecting the sale; and the evidence is sufficient to establish such relation of principal and agent, where the vendee authorized her son-in-law to represent her in closing the deal and he employed such person to assist him in the matter.

Appeal from a judgment of the superior court for Pierce county, Shackleford, J., entered June 28, 1910, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, in an action to reform a chattel mortgage and for a foreclosure. Reversed.

Burkey, O'Brien & Burkey, for appellant.

Frank H. Kelley, for respondent.

Morris, J.—Action to reform a chattel mortgage and for a foreclosure. Upon the trial below there was no dispute as to the facts upon which the reformation was asked, and the same was granted; the dispute being as to the amount unpaid as between the parties, upon which issue the court found for respondent, and entered judgment in her behalf, denying a foreclosure, from which this appeal is taken. The notes and mortgage to secure the same were given December 21, 1906, to secure the amount due upon the furniture of a rooming house at Tacoma. There were forty notes, each in the sum of $30, payable successively on the 21st of each succeeding

[1]Reported in 113 Pac. 255.

month, with interest at ten per cent, except the fortieth and last note which called for a payment of $19.55. In April, 1909, the rooming house was owned by a Mrs. West, subject to the amount then due upon the notes and mortgage. The respondent, desiring to purchase a rooming house, consulted with Mr. Bruggeman, a real estate broker, to procure one for her, and in a day or two Bruggeman called to the attention of respondent the fact that Mrs. West desired to sell her house, and was directed by respondent to consult with her son-in-law, Munro, whom she authorized to act for her in the negotiations, and who thereupon took up the matter in her behalf. The purchase price as fixed by Mrs. West was $1,150, purchaser to assume the amount then due upon the notes, the balance to be paid to her in cash, which terms were accepted by respondent. Thereupon Munro directed Bruggeman to ascertain the amount due upon the notes, and for that purpose Bruggeman went to a bank where the same were held for collection, and made inquiry and says he was there told the amount then due, which he communicated to Munro. He does not recall what that amount was, nor what was said to him at the bank; but whatever information he received he communicated to Munro.

At this time the last fourteen notes were unpaid, making $409.55 then due, with interest on each note from December 21, 1906. Munro then had a bill of sale prepared in which the purchase price was fixed at $423.41, which amount was ascertained by taking the principal at $409.55 and adding interest from December 21, 1908, to April 14, 1909, the date of the bill of sale, upon the theory that the interest was payable annually and had been paid up to December 21, 1908; when in fact the interest was not so payable, the interest upon each note being payable at its maturity. Munro instructed Bruggeman to obtain respondent's consent to the transfer, and for that purpose he called upon her at her home. Respondent called in Mr. Hallowell, her business agent, to whom the bill of sale was submitted. Hallowell as-

certained from Mrs. West, who was present, that thirteen $30 notes and the $19.55 note were then unpaid, and explained to Bruggeman that $423.41, the amount fixed in the bill of sale, was not the correct sum then due, but that such sum should be $409.55 principal and interest added; that it would take some time to figure the interest on each note, and that he would change the consideration from $423.41 to $409.55, and the interest could be properly ascertained at the bank where the notes then were. The figures $423.41 were then changed to $409.55 wherever they occurred in the bill of sale, and also in the consent to the transfer upon the back thereof, and respondent then signed the consent. In making this change the word "interest" was not erased, so that instead of reading "$409.55 with interest, according to the terms of the notes," it read, "upon which there is due a balance of principal and interest of $409.55," and in the consent to the transfer it read, "that the balance due thereon, including principal and interest to this date, amounts to $409.55." Hallowell is corroborated in his testimony that it was the real intention, and so understood by all, that the $409.55 represented only the principal due December 21, 1908, upon which the interest was to be computed by respondent and her daughter. Bruggeman says there was something said to Hallowell and some statement made as to the amount then due, which was given as the reason for making the change, but he does not recall what it was. He saw the change made, but his memory failed him as to why it was done, or what was said in connection therewith. He, however, returned the bill of sale to Munro, who paid Mrs. West the difference between $1,150 and $409.55. Munro admits, before closing the sale, he knew the principal of the fourteen notes then unpaid amounted to $409.55, and that the notes bore interest at ten per cent, but says, while he knew the notes bore interest, his idea was that respondent would only be liable for such interest from the day she assumed their payment. After closing the transaction with Mrs. West,

Munro and Bruggeman went to the bank and Munro paid and took up the first note, paying the principal sum of $80 and the interest from December 21, 1906, amounting to seven dollars, and thereafter from May 1 to October 15, Munro took up six other notes, upon each of which he paid interest from December 21, 1906, telling Mr. Burkey, of counsel for appellant to whom two of the notes were paid, "that he guessed he had got stuck for that back interest, but that he would have to pay it."

Munro is admitted to have been respondent's agent in the transaction. His knowledge and his acts would be her knowledge and her acts. The question for us to determine on this appeal is, whom did Bruggeman represent; and to what extent, if any, is respondent bound by his knowledge and his acts. The court below found, to which no exception was taken, that Munro as the general agent for respondent had full authority from her "to employ all persons by him deemed convenient in making said purchase and closing said deal." We think such finding is justified by the evidence, and that under such authority Munro obtained and made use of the services of Bruggeman. Respondent enlisted the services of Bruggeman in the first instance to find a rooming house for her. In making such a search, he was certainly acting for her. He found the West house, and reported the same to her. She thereupon substitutes Munro for herself, and directs Bruggeman to continue negotiations on her behalf with Munro, giving Munro full power to represent her. Munro sends Bruggeman to the bank to find out the balance due. He sends him to appellant with the bill of sale to obtain her consent. He takes him to the bank to make the first payment. His entire activities in the transaction were in representing the purchase, and not the sale, of this property, and as such he was broker for respondent, who in her turn was represented by Munro. The knowledge he obtained at appellant's home as to the true amount due being $409.55 with interest on the several notes, his acceptance of the bill of sale with appellant's

consent thereon, obtained only after and in consideration of the changed figures, the substitution by consent of all of the $409.55 for $423.41 as originally fixed in the bill of sale, which is clearly established by the uncontroverted evidence of three witnesses and which although admittedly taking some part in the transaction he does not dispute, only saying something was said but he does not recall what it was, would be the act of respondent and bind her to the substitution. The payment upon the same day by Munro and Bruggeman of the first note due, with an added interest payment from the time appellant contends it was understood and agreed, leads us to the conclusion that, as the agent of respondent, he did enter into the understanding and agreement whereby $409.55, with interest on the several notes from December 21, 1906, was substituted for $423.41. This conclusion is confirmed by the subsequent acts of Munro in paying six of these notes with added interest from the same date.

It was the opinion of the trial court that Bruggeman was the agent for Mrs. West. As between Mrs. West and respondent this might be true, but as between respondent and appellant, he acted for respondent. If he was the agent for Mrs. West in closing the deal with respondent, after such negotiations had ended and the arrangement for the transfer of the property fully made and agreed upon, he could then act as the agent for respondent in the subsequent dealings with appellant, there being no adverse interest in that transaction between respondent and Mrs. West. That he did so represent respondent is further evidenced by the persons present at that transaction; Mrs. West representing herself, Mr. Hallowell representing appellant, and Bruggeman representing respondent—not assuming to represent her without authority, but sent there for that express purpose by Munro.

For these reasons, the judgment of the lower court is reversed, and the cause remanded for further proceedings as prayed for by appellant.

Dunbar, C. J., Rudkin, Crow, and Chadwick, JJ., concur.

[No. 9058. Department Two. February 7, 1911.]

THE STATE OF WASHINGTON, *on the Relation of A. G.* LINHOFF, *Respondent*, v. SEATTLE, RENTON & SOUTHERN RAILWAY COMPANY, *Appellant*.[1]

APPEAL — DECISIONS REVIEWABLE — CESSATION OF CONTROVERSY — DISMISSAL. A cause pending in the supreme court, arising under a certain city ordinance, will not be dismissed on the ground of cessation of the controversy by reason of the fact that the ordinance has been amended in certain particulars or reenacted, when the changes made are irrelevant to the issues presented in the pending case and the subject-matter of the suit is in no way destroyed or modified by the amendatory ordinances.

Motions to dismiss an appeal from a judgment of the superior court for King county, Gay, J., entered March 2, 1910, or to remand the case with instructions to dismiss the action. Denied.

Will H. Thompson and *Morris B. Sachs*, for appellant.

Scott Calhoun and *H. D. Hughes*, for respondent.

CHADWICK, J.—This case is pending on appeal and is brought before us upon two motions, the one that the appeal be dismissed, the other that the case be remanded to the superior court with instructions to dismiss the action, for the reason that the controversy has ceased to exist. For some time prior to October, 1910, the appellant company was operating a line of street railway in the city of Seattle, under a franchise evidenced by Ordinance No. 15,919. Section 4 of this ordinance provided, among other things, for a common user under certain conditions, and also provided for transfers from one line of street railway to another. The present action grows out of a difference between the city and the company respecting transfers to other lines of railway.

Pending the appeal to this court, it seems to have become necessary to make certain changes in the routing of the cars.

[1]Reported in 113 Pac. 260.

A plan was proposed by the city and accepted by the company. Under Ordinance No. 15,919, the cars of the company were routed by way of Westlake avenue. To meet the desires of the parties, it became necessary to enact another ordinance, which was done by way of an amendatory Ordinance No. 25,038. This ordinance routes the cars by way of Stewart street, making a loop at the north terminus of the company's lines. This was accomplished by striking out the words "Westlake avenue" in section 2 of the Ordinance, and inserting the words "Stewart street." To make the ordinance consistent it was also necessary to change the words "Westlake avenue," as they occurred in section 4 of the Ordinance, to "Stewart street." No other changes were made or contemplated by the parties. The sections as amended were set out and published in full. Section 4 of the original ordinance included several definitions of the relative rights of the parties, and was complete within itself. It is now contended that, although the procedure adopted in making the amendment was proper, yet nevertheless, because of the peculiar provision contained in the charter of the city of Seattle with reference to amending ordinances, it is a virtual reenactment, so that instead of being a continuation of the old, it is a new ordinance; and that the controversy having arisen under section 4 of the old ordinance, and it having gone out of existence, the action pending in this court must fail for the want of a subject-matter. The provision of the city charter, art. 4, § 12, is as follows:

"No ordinance shall be revised or re-enacted or amended by reference to its title. But the ordinances to be revised or re-enacted or the section thereof amended shall be re-enacted at length as revised or amended."

Art. 2, § 37, of the state constitution is as follows:

"No act shall ever be revised or amended by mere reference to its title, but the act revised or the section amended shall be set forth at full length."

The general rule governing amendments made under such provisions is as follows:

"The constitutions of some states contain, after the section requiring a statute or section amended to be repealed in its amended form, a further provision that the statute amended 'shall be repealed.' The latter clause has been held sometimes as in itself effecting the repeal of the sections amended without an express clause of repeal, but other courts hold that an express clause of repeal in amendatory statutes is necessary. Without such constitutional provision an amending statute setting out the whole act as amended is, according to the better view, a repeal only as to the portions of the original act left out in the amendment, but as to the portion unchanged in form or substance is considered as a continuation of the original act; but in other states such an amending act is considered as entirely repealing the whole statute reproduced and amended, so that the original statute as to the portion reproduced and amended 'ceases to exist.' But these rules are only rules of construction, and the last has been held to yield to the intent of the legislature, where circumstances showed that it was intended not to repeal but to re-enact and continue the old law." 26 Am. & Eng. Ency. Law (2d ed.), 713.

We find nothing in the clause quoted from the charter of the city that in our judgment modifies this rule. It is true that the words "revised, re-enacted or amended" are used, but whether the act of the city in passing Ordinance 25,038 be called a reenactment or an amendment, it can make no difference. The object sought to be accomplished is the same in either event, and the result would be the same whatever the form of the provision of the charter. The changes made are wholly irrelevant to the issue presented in the main case, and the subject-matter is in no way destroyed or even modified by the amendatory ordinance.

The motions are technical and without merit, and are denied.

DUNBAR, C. J., RUDKIN, MORRIS, and CROW, JJ., concur.

[No. 9290. Department Two. February 7, 1911.]

J. P. JACOBSEN, *Respondent*, v. HENRY ROTHSCHILD *et al.*, *Appellants*.[1]

MASTER AND SERVANT—FELLOW SERVANTS — SIGNALS — PRESUMPTIONS—EVIDENCE—SUFFICIENCY. Where a winch tender testified that he "let go" a sling load of ties in obedience to an order from the foreman in charge of the work, the presumption that the signal was given by the hatch tender is overcome, and the finding of the jury to that effect controls, although the foreman denied that he gave the signal.

SAME—FELLOW SERVANTS—WHO ARE—SIGNALMAN AND FOREMAN. Where workmen are compelled to depend upon signals, the master's duty of conveying the signals is nondelegable, so that a hatch tender giving signals would not be a fellow servant of the foreman of the crew.

MASTER AND SERVANT—DEFECTIVE APPLIANCES—EVIDENCE—SUFFICIENCY. Where an injury resulted to a stevedore through the inability of the winch driver to make the winch obey the lever, testimony by the winch driver that he told the foreman that the winch was defective, whereupon he was directed to do the best he could with it, is sufficient to warrant the submission to the jury of an issue as to the defective condition of the winch.

MASTER AND SERVANT—SAFE PLACE TO WORK—INSTRUCTIONS. It is not reversible error to instruct that the master owes the duty to furnish his servant with a safe place to work, instead of instructing that he must exercise ordinary care in furnishing a safe place, where the instruction is qualified by another to the effect that the master is not an insurer of the safety of the place, but that the law imposes upon him the duty of exercising a reasonable degree of care in the furnishing of a safe place.

DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for $1,500 for the loss by a stevedore of two toes, is not so excessive as to warrant the supreme court in setting it aside, where it appears that the plaintiff lost two months' time, during which he suffered great pain, and it is impossible for him to bear the full measure of his former burden in the same class of work.

Appeal from a judgment of the superior court for King county, Albertson, J., entered June 13, 1910, upon the verdict of a jury rendered in favor of the plaintiff, in an action

[1]Reported in 113 Pac. 261.

for personal injuries sustained by a stevedore in loading a vessel. Affirmed.

Trumbull & Trumbull, for appellants.

Heber McHugh and *John T. Casey*, for respondent.

CHADWICK, J.—Plaintiff Jacobsen was employed as a side runner in a stevedoring crew, engaged in loading a vessel at Eagle Harbor, in this state, on the 18th day of September, 1909. The vessel was being loaded with railroad ties, and the work had so far progressed that the hold was filled on each side of the hatchway, leaving a space the size of the hatchway and about ten feet deep to be filled. Ties were brought to the ship on a raft, and were carried in loads, varying from seventeen to twenty-four ties, to a point over the open hatchway by a derrick operated by a winchman. The load was then taken by another winch and lowered into the hold. Two crews were working in stowing away ties, one on each side of the ship. Plaintiff had charge of one of the crews. A sling load of ties had been lowered into the hold, where they were to be released from the sling. It was customary to land the load on cross-ties so that, when the rigging was released, the sling could be carried up by the tackle. When this particular load had been brought to within eighteen inches of the cross-ties, the winch stuck. Plaintiff, whose duty it was to give orders from the hold, called to the hatch tender, who was signalman, to "come back." This meant that the load should be allowed to come down slowly, so that the men could control its resting place by means of picaroons, the crew being divided and two being at either end of the load, the testimony showing that, because of the stanchions and the stowed-away ties, it would have been inconvenient, if not impossible, to control the load by standing at the side of the load, unless the employees stood amidships, which the testimony shows was seldom if ever done by the crew for the reason that it would probably have been impossible on ac-

count of the working of the crew engaged on the opposite side of the ship.

The testimony of the winchman is that the hatch tender called to him two or three times to let the load "come back;" that he made several efforts to lower the load, but that the winch refused to obey the lever, when a Mr. Pierson, who was the foreman in charge for the defendants, called to him to "let go," which was a signal meaning to drop the load. This he did in obedience to the order of the general foreman. The load dropping suddenly could not be controlled by the men below, and dropped on one of the cross-ties in such a way that it was inclined and some of the ties from the middle of the load slid out, one of them striking plaintiff on the foot and mashing off his great toe, and so injuring the second toe that it, too, had to be amputated within about a month from the time of the injury. A verdict for $1,500 was rendered in favor of the plaintiff, and from a judgment upon the verdict, defendant has appealed.

The principal reliance, or rather the first question to be disposed of, is the contention of appellant that the hatch tender and respondent were fellow servants. Respondent argues this proposition from two premises, one of fact and the other of law. The assumption of fact is that the foreman, Mr. Pierson, did not give the signal to the winchman to "let go," but that the signal was given by the hatch tender. It is true that Mr. Pierson denies, in a way, that he gave this signal. His testimony is not as positive as it might be, and when considered in the light of the positive testimony of the winchman that he did give the signal, and the testimony of Pierson that he was in such control of the men employed on the ship that he expected all of his orders to be obeyed, we think the assumption of fact made by respondent should be disregarded and the finding of the jury should control. But assuming that respondent is right in his contention that the signal was given by the hatch tender or signalman, it does not follow

that respondents are relieved of their liability under the doctrine of fellow servant. Respondent and the hatch tender were not working together in such a way as to make them fellow servants. Nor was respondent in a position where he could have protected himself against the negligence of his co-laborer or, as was said in *Jock v. Columbia & Puget Sound R. Co.*, 53 Wash. 437, 102 Pac. 405, "he could see clear around the whole transaction." The rule has been frequently announced by this court that it is not the rank of the servant but the character of the act which determines the relation of co-employees. *Jackson v. Danaher Lumber Co.*, 53 Wash. 596, 102 Pac. 416, and cases there cited.

It has been as frequently announced that, in the work of loading a ship where one workman is compelled to depend upon signals passed by another workman to the one in control of the movement of the cables and slings, the one conveying the signals to the winch driver is performing the duty of the master, a duty that is not delegable under the law, and that the rule of fellow servant does not apply. It was so held in *Westerlund v. Rothschild*, 53 Wash. 626, 102 Pac. 765; *Anderson v. Globe Nav. Co.*, 57 Wash. 502, 107 Pac. 376, and *Norman v. Shipowners Stevedoring Co.*, 59 Wash. 244, 109 Pac. 1012; and the same rule was followed in a case involving the like principle in *Engelking v. Spokane*, 59 Wash. 446, 110 Pac. 25. The facts of this case bring it within the rule of these cases, for the testimony shows that the work, from its very nature and the place of its performance, had to be carried on by signals passed from one workman to another. It was of such a character that superintendence could not be dispensed with. It follows that the injury sustained by respondent cannot be charged to the negligence of a fellow servant.

Appellants complain that the court submitted two charges of negligence; first, that the accident resulted from a defect in the winch, and second, that the foreman gave the wrong signal to the winchman; whereas there was no testimony to

show a breach of appellants' duty in so far as the character of the winch is concerned. This objection is based upon the assumption that there was no testimony showing any specific defect in the winch, and that the law will not notice a general objection. At least one witness, the winchman, testified that he told the foreman that the winch was in a defective condition, saying it was "no good," and that the foreman told him to take hold of it and do the best he could. This was sufficient ground to warrant the submission of this issue to the jury.

It is further contended that the court in its instructions said that, "It is the duty of the employer to provide the employees with a reasonably safe place with reasonably safe appliances. Not only must the particular place at which the employee is put to work be reasonably safe, but the agencies in and around the building that are employed in the operation of it must be such as to reasonably provide for the safety of the man at his work." It is submitted that this is not a proper statement of the law; that the measure of the master's duty or liability is to exercise ordinary care, having regard to the hazards of the service, to provide the servant with a reasonably safe working place, machinery, tools, and appliances, and to exercise ordinary care to maintain them in a reasonably safe condition of repair. Many authorities are cited to sustain this contention, and they do sustain it; and if the instruction stood alone it would be objectionable, for it makes an employer an insurer of the safety of the servant, when his whole duty is performed when he has exercised ordinary care, having regard for the hazards of the work, to provide the servant with a reasonably safe working place, tools, and machinery, and has exercised ordinary care to keep them in a reasonably safe condition of repair. The decisions of this court, when traced from the beginning, will show that it has never intended to go beyond the rule as we now state it. The case of *Harris v. Brown's Bay Logging Co.*, 57 Wash. 8, 106 Pac. 152, is the latest expression of the court, and is relied on by respondent to sustain the instruction

quoted above. The court there met the specific objection urged, the words "positive duty" were challenged, and it was there held that they were the antithesis of the words "non-delegable duty." In that case we said:

"The court charged the jury that 'the master owes the positive duty to an employee to provide him with a reasonably safe place in which to work, so far as the nature of the work undertaken and the exigencies of the case will permit the same to be made reasonably safe . . . .' The objection is to the word positive. It is said that it in effect makes the master an insurer of the safety of the place, while the rule is that the master is only required to exercise reasonable care and diligence in his performance of this duty. But we think the appellant has given the word a meaning it does not have in the connection in which it is here used. It will be noticed that the adjective qualifies the noun, 'duty,' and is used rather as the antithesis of the word 'delegable,' than as a measure of the diligence required of a master in his effort to comply with the requirements of the rule—it being meant to assert that the master could not relieve himself of liability for the nonperformance of the duty of furnishing his servant with a safe place in which to work by delegating that duty to another. But, however this may be, that this is a correct statement of the rule has been repeatedly announced by this court. *McDonough v. Great Northern R. Co.*, 15 Wash. 244, 46 Pac. 334; *Ogle v. Jones*, 16 Wash. 319, 47 Pac. 747; *Shannon v. Consolidated Tiger & Poorman Min. Co.*, 24 Wash. 119, 64 Pac. 169; *Green v. Western American Co.*, 30 Wash. 80, 70 Pac. 310; *Czarecki v. Seattle & S. F. R. & Nav. Co.*, 30 Wash. 288, 70 Pac. 750; *Mullin v. Northern Pac. R. Co.*, 38 Wash. 550, 80 Pac. 814. The rule is also stated in this form in 26 Cyc. 1104."

This might be misleading unless it be known that the court in that case properly qualified the instruction in another instruction expressly admonishing the jury that the master was not to be held as an insurer, but only to the standard of ordinary care. So in this case is the instruction calling for this discussion qualified. The court said:

"The law does not impose upon the employers of labor the obligation of an insurer of life or limb of the employee; it

does not impose upon the employer the exercise of the highest degree of care that might be exercised in the furnishing of a place for the workman to do his work, but the law does have a high regard for the safety of human life, for the safety of a man who is doing his work in a way that he ought to do it; and the law imposes upon every employer of labor, with reference to the welfare of the workingman, the duty of exercising a reasonable degree of care in the furnishing of a safe place for the man to do his work and in the furnishing of materials with which he shall do his work and with which the work of the employer shall be done;"

thus bringing the instructions as a whole within the true rule. We have pursued this subject to a greater length than might seem necessary, for we realize that some confusion and misunderstanding have worked into the law, because, as in the *Brown* case, although discussing a particular objection only, it has been assumed that a general objection which was not raised had been or would be disposed of in the same way.

It is finally contended that the verdict of the jury is so excessive as to call for a reduction, on the theory that it is the result of passion and prejudice on the part of the jury. Plaintiff lost about two months of his time, during which time he suffered great pain, and his testimony is to the effect that it is impossible for him to bear the full measure of his former burden, although employed in the same class of work. While the verdict may seem large—and it is substantial—it is not so great as to warrant an arbitrary order of this court reducing it. Judgment affirmed.

DUNBAR, C. J., RUDKIN, MORRIS, and CROW, JJ., concur.

[No. 9279. Department Two. February 7, 1911.]

E. R. BUTTERWORTH, *Appellant*, v. REA F. BREDEMEYER, *Respondent*.[1]

SALES—ACTIONS FOR PRICE—PLEADING—COMPLAINT—SUFFICIENCY. A complaint states a cause of action for goods sold etc., where it alleges that the plaintiff, at the special instance and request of the defendant, furnished certain goods and performed services in conducting the funeral of the defendant's husband and that defendant O. K.'d the bill; and it is immaterial that a bill of particulars showed that defendant guaranteed payment within thirty days; since there was no inference that credit was extended to the estate, and the guarantee goes to the time and was not collateral to the promise of another.

Appeal from a judgment of the superior court for King county, Gay, J., entered October 11, 1910, upon sustaining a demurrer to the complaint, dismissing an action on contract. Reversed.

Karr & Gregory and *H. D. Sutton*, for appellant.

Jay C. Allen, for respondent.

CHADWICK, J.—This action was brought by appellant to recover the sum of $393, alleged to be due for goods sold and services rendered by appellant to respondent. The parts of the complaint material to our present inquiry are as follows:

"That the plaintiff herein, at the special instance and request of this defendant, on or about the 10th day of May, 1910, furnished certain goods, wares and merchandise and performed certain services in conducting the funeral of J. A. O. Bredemeyer, the deceased husband of this defendant, of the reasonable value of three hundred and ninety-three ($393) dollars, and for which goods, wares and merchandise furnished, and services performed, this defendant agreed to pay the sum of three hundred and ninety-three ($393) dollars.

"That the said goods, wares and merchandise furnished and services performed for the funeral of J. A. C. Bredemeyer were done at the special instance and request of this defend-

[1]Reported in 113 Pac. 253.

ant, and she, the said defendant, O. K'd the bill of this plaintiff for three hundred and ninety-three ($393) and guaranteed the payment thereof.

"That this plaintiff has demanded payment of said sum of three hundred and ninety-three dollars ($393) from the defendant herein, but defendant has refused to make such payment, and the full sum of three hundred and ninety-three dollars ($393) is now due and owing this plaintiff."

The court sustained a demurrer to this complaint, upon the ground that it did not state facts sufficient to constitute a cause of action. A bill had been made out and guaranteed by respondent as follows: "Payment guaranteed within 30 days. Rea F. Bredemeyer." This was submitted by way of a bill of particulars. The court seems to have given a meaning to the words "guaranteed the payment" and "payment guaranteed" that, in our judgment, is not warranted. The complaint clearly states that the goods were furnished to the respondent, and that the services were rendered at her request. There is nothing in the complaint, even as illuminated by the bill of particulars, that would warrant the court in holding that the credit was extended to the estate of the husband of respondent, and that a claim should have been presented to the administrator of the estate. The words "and payment guaranteed inside of thirty days" obviously mean that the guaranty goes to the time of payment, and was not intended to be collateral to the implied promise of another. The word "guarantee" would be inapt unless the complaint alleged that the goods were sold upon the credit of the estate.

If appellant sold the goods and performed the services upon the credit of the estate, and merely caused the respondent to O. K. the bill and guarantee its payment, the fact may be shown by answer and proof. The complaint will not warrant the inference.

Judgment reversed, with instructions to overrule the demurrer.

DUNBAR, C. J., RUDKIN, MORRIS, and CROW, JJ., concur.

[No. 9307. Department One. February 7, 1911.]

C. F. Lathrop, *Appellant*, v. John C. Sundberg *et al.*, *Respondents*.[1]

Libel and Slander—Defenses—Violation of Statute. An osteopath cannot recover damages for a libel characterizing him as a quack and charlatan, where it appears from his testimony that he was practicing osteopathy in violation of the laws of the state making it a misdemeanor to maintain an office with his name and the word "Doctor" in public view.

Same—Right to Maintain Action. One illegally advertising as a doctor cannot maintain an action for libel on the theory that he had a common law right to practice osteopathy.

Same—Complaint—Issues and Proof. Under a complaint for libel in charging an osteopath with being a quack and a charlatan, it cannot be claimed that the publication was of and concerning osteopathy as a profession, and that the damage resulted to the plaintiff as a member of that profession.

Appeal from a judgment of the superior court for King county, Gay, J., entered September 20, 1910, dismissing an action for libel, upon withdrawing the case from the consideration of the jury at the close of the plaintiff's evidence. Affirmed.

P. W. Willett, for appellant.

McBurney & Cummings, for respondents.

Gose, J.—There was a former appeal in this case. See *Lathrop v. Sundberg*, 55 Wash. 144, 104 Pac. 176, 25 L. R. A. (N. S.) 381. The complaint alleges that the plaintiff, upon the date hereafter stated, was and is an osteopath, graduated from a school of osteopathy, holding a degree of that school, and practicing his profession as such in the Eitel Building in Seattle; that about the 16th day of March, 1908, the defendants published in a newspaper in that city,

[1]Reported in 113 Pac. 574.

of and concerning him in his business and professional capacity, the following libel:

"We, the following reputable physicians and dentists, occupying offices in the Eitel Building, endeavoring to uphold the honor and dignity of our professions and desiring to encourage only the best and most desirable tenants for our office building, and thereby conserve the best interests of the public at large, are most emphatically opposed to the indiscriminate rental of offices in this building to osteopaths, neuropaths, autopaths, chiropractors, uptomtereists, unprofessional masseurs, criminal practitioners, 'medical institutes,' 'advertising specialists,' patent medicine fakers, quacks, charlatans and other fraudulent concerns. We, therefore, demand the removal of all such persons now holding offices in this building and the exclusion therefrom of all such undesirable tenants in the future;"

thereby intending to and charging him with being "a quack and a charlatan" in his business and professional capacity, and diminishing his earnings to the extent of $300 per month. His damages are laid at $75,000. Issue was joined and the case proceeded to trial. After the plaintiff had testified, the court withdrew the case from the jury, and entered a judgment of dismissal. The plaintiff has appealed.

The appellant testified that, while pursuing his calling as a barber, he read four typewritten lessons a week for fifty-two weeks from an osteopathic correspondence school, embracing the subjects of anatomy, physiology, and pathology; that with such preparation he began practicing as an osteopath in February, 1906, moved into the Eitel Building the latter part of that year, and remained there until after the publication of the article we have set forth, and that he had upon his office door the words "Dr. C. F. Lathrop, Osteopathic Physician," while in that building.

The appellant earnestly insists that he should have been permitted to offer further evidence tending to show that he is an osteopath, and that his case should have been submitted to the jury. We think the learned trial court took the correct view of the case. When he withdrew it from the jury, it ap-

peared from the testimony of the appellant himself that he was pursuing his practice in a manner forbidden by the laws of the state. Laws 1901, page 50, § 3, makes it a misdemeanor, punishable by fine or imprisonment or by both, for a person to maintain "an office or place of business with his or her name and the words . . . 'Doctor' . . . in public view," without having obtained and filed a license as provided by law. In *State v. Pollman*, 51 Wash. 110, 98 Pac. 88, it was held that a prefix or qualifying words to the title "Physician" did not relieve a party from the penalty of the statute; that the abbreviation "Dr." offended the law to the same extent as the word "Doctor;" that the purpose of the statute is to protect the people against deception, and that "it is practitioners of the regular school rather than the others that the ill and infirm seeking relief usually expect to find when entering a room whose door has lettered upon it the name of a person preceded by the title 'Dr.' or followed by the letters 'M. D.' or 'Physician and Surgeon.'"

As we have seen, the appellant fixes his actual damages at $300 per month. Without undertaking to define the words "quack" and "charlatan," the terms by which the appellant was characterized in the libel, it suffices to say that he was knowingly luring patients into his office by a method condemned by the penal laws of the state. This was a fraud and imposition upon the public, and the law will afford him no redress for the loss of earnings sought to be acquired in that manner. On the former appeal we said, speaking of the libel in question:

"Clearly this is libelous *per se*, if published of and concerning the appellant and he is engaged in a reputable practice, and that it was published of and concerning the appellant and that his practice is reputable, was distinctly alleged in the complaint."

He could not be engaged in a reputable practice while offending against the statute. As was said in *Hargan v. Purdy*, 14 Ky. Law 383, 20 S. W. 432:

"If he was then undertaking to practice medicine in violation of the statute of the state, he could not, in contemplation of law, have been injured or sustained damage from being called an 'empiric' or 'quack;' or, at all events, he could not be heard in a court of justice to complain that words had been spoken or written of him having the simple effect to disable or deter him from violating a penal law."

See, also, *Marsh v. Davison*, 9 Paige's Ch. (N. Y.) 508.

He contends, that he had a common law right to practice osteopathy without a license; that he was libeled while pursuing that right; and that his damages should have been assessed by the jury. If he had advertised and practiced as an osteopath, that question would be presented. He further complains that, as a matter of fact, the article was published of and concerning osteopathy as a profession, and that he, as a member of that profession, was damaged. The charge in the complaint, however, is not that he was damaged by a libel against the profession of osteopathy, but that "the defendants thereby intended to and did charge the plaintiff with being a quack and a charlatan." A litigant will not be permitted to recover damages because he has been prevented from pursuing his business in violation of the laws of the state.

The judgment is affirmed.

Dunbar, C. J., Parker, Mount, and Fullerton, JJ., concur.

[No. 9252. Department Two. February 7, 1911.]

HUGH McSORLEY, *Appellant*, v. J. W. BULLOCK, *Respondent*.[1]

TRUSTS—CONSTRUCTIVE TRUSTS—EVIDENCE—SUFFICIENCY. A constructive trust is shown, by clear and convincing testimony, although the evidence of the two parties in interest is in direct conflict, where it appears that the plaintiff was interested in a bankrupt corporation and applied to the defendant for an advance to enable him to bid for the assets at a receiver's sale, that the defendant consented, and stated to others in plaintiff's presence that he was bidding in the property for the plaintiff and that there was not time, and it was not necessary to draw up a contract, the plaintiff taking an active interest in the sale, the arrangement being that defendant was to take the bill of sale in his own name for security only, after which he repudiated the trust and converted and sold the property.

SAME—FRAUDS, STATUTE OF—POSSESSION OF TRUST PROPERTY. The statute of frauds does not apply to an oral agreement to advance the money to bid in property at a sale and hold the same in trust for another, whereby a constructive trust is created, and it is immaterial who had possession of the property.

TROVER AND CONVERSION—DAMAGES—MEASURE—TRUSTS—LIABILITY OF TRUSTEE. Where a trustee sells and dispossesses himself of property bid in by him and held in trust for another, he is guilty of a conversion, and the measure of damages is the market value of the goods at the time of the conversion, with interest, less the sum advanced by the trustee on the purchase price.

Appeal from a judgment of the superior court for King county, Robert H. Lindsay, Esq., judge *pro tempore*, entered April 25, 1910, in favor of the defendant, after a trial on the merits before the court without a jury, in an action for conversion. Reversed.

Brady & Rummens, for appellant.

Fred H. Peterson and *Philip D. Macbride* for respondent.

DUNBAR, C. J.—The appellant brought this action against respondent to recover $1,361.73, the alleged reasonable

[1]Reported in 113 Pac. 279.

value of a certain stock of goods, alleged to have been the property of the appellant and converted to his own use by the respondent. The allegations of the complaint are to the effect, that a certain stock of goods which belonged to a corporation which was in bankruptcy, the goods being in the hands of a receiver, were to be sold by the receiver under the direction of the referee in bankruptcy; that appellant had an interest in the corporation and the goods and, being desirous of purchasing the same at the receiver's sale, made an arrangement with the respondent to bid the same in for him, and to take the bill of sale for same for his security until he (the appellant) should refund the amount of money so advanced, and agreed upon the time and upon a reasonable payment to the respondent for the money advanced and for his time; that shortly after the receiver's sale, the respondent converted the goods to his own use and sold them to a third party. This complaint was denied by the respondent, his contention being that he bought the goods on his own account, having had no agreement whatever with the appellant in regard to the same. Upon these issues the case went to trial without a jury, and a judgment was rendered that the plaintiff take nothing by his complaint, and that the cause be dismissed. From this judgment, this appeal is prosecuted.

The court made no findings of fact or conclusions of law. It is conceded that this agreement, if any, was an oral agreement. The testimony is absolutely conflicting. If the testimony of the appellant is true, the respondent was acting as his trustee in the transaction, and it being conceded that he converted to his own use the stock of goods in question, he is bound to the appellant for their value. If, on the other hand, the testimony of the respondent is true, the appellant had no interest whatever in said goods.

There is no possible way of reconciling the testimony. The appellant, McSorley, testified that, being anxious to obtain this stock of goods and having failed to obtain the

money from other sources to bid them in at the receiver's sale, upon the day of the sale, about ten o'clock in the forenoon—the sale occurring in the middle of the afternoon, he called the respondent up by telephone, told him of his desires in regard to the purchase, and asked him to advance the money; that respondent answered, saying: "Why, that is a surprise to me. Yes, I will be right down in a few minutes;" that in response to the telephone, the respondent did come down to the store where these goods were in the possession of the appellant; that they talked the matter over and respondent informed appellant that he had a lot of money in his pocket, which he got on his way down; that they made the arrangement alleged in the complaint; that appellant informed Bullock that they would have to be in a hurry as the sale was to take place at two o'clock, and that they had better go and have an agreement drawn up; that they then repaired to the office of Judge Gay, who was at that time a practicing attorney in Seattle; that before Judge Gay made his appearance, Bullock said to McSorley: "Well, Mac, how are you going to fix me up on this?" " 'Well,' I says, 'I will tell you,' I says; 'I want money enough to buy this stuff with and I will pay you for the use of your money and as security you take the bill of sale in your name for about three weeks, and I will be able to pay you back.' Mr. Bullock said: 'That is perfectly satisfactory, Mac. That is all right. Let's go in and see Mr. Gay;' " that he informed Bullock that he would put in a special sale of the goods in order to get his money back quickly, and that Mr. Bullock replied that that would be a capital idea; that he told Bullock he would pay him a reasonable amount for the use of his money and for his trouble. This conversation is denied *in toto* by Bullock, and he disclaims ever having had any conversation with McSorley on the subject. He does admit, however, having gone to Judge Gay's office with McSorley for some purpose, and says that it was for the purpose of having Gay draw up a bid for him.

If the testimony stopped here, conceding the witnesses to be of equal reputation and standing, and considering that their testimony was heard by the lower court, and that the burden of proof was upon McSorley to establish his claim, we would be compelled to affirm this judgment. But outside of the testimony on other propositions, which is not important in determining the main question, there is testimony upon the direct question as to whether or not this contract was made which seems to us to turn the scales in favor of appellant. If, as Bullock says, McSorley had no interest in the affair, it is difficult to understand why McSorley would be accompanying him on these trips to the office of Judge Gay and to other places mentioned in the testimony, and why he would appear so actively in the transaction. But the testimony of Judge Gay was to the effect, that McSorley and Bullock called upon him that afternoon; that McSorley was an old client of his; that he took such an interest in McSorley's obtaining these goods that he went down to Judge Hoyt's office and obtained the postponement of the sale for an hour or more; that the matter was talked over in his presence; that in Bullock's presence McSorley made the statement that Mr. Bullock was going to buy this property for him; that the sale had been put off really to wait for McSorley's bid; that Judge Hoyt, referee in bankruptcy, had continued it from time to time to get McSorley's bid, wanting to give him the best show, and they fixed it up; that at that time he asked Bullock and McSorley if they wanted a contract drawn between them to show the nature of that transaction, to which Mr. Bullock said in reply: "No, we understand each other thoroughly and there will be no necessity for any contract. We have not much time anyway. We will have to hurry to get over there;" that the general trend of the conversation was that Bullock was buying it for McSorley. And the witness concluded by saying: "That was my absolute belief at that time from what they said."

The testimony of Walter McClure, the attorney for the

receiver, was to the effect that McSorley and Bullock came to his office together, to obtain the bill of sale of the property which Bullock had bid in. He testified further as follows: "That it was understood by me, and I am of the opinion it was understood by all those present, that Mr. Bullock was buying the property for Mr. McSorley." In further answer he said: "At that time Mr. Bullock said to me that he was buying the property for Mr. McSorley;" that he said substantially that he was in the fuel business and was not in the harness business or the saddler business, and had no use for a business of that kind, and he was buying the property for Mr. McSorley, and that he expected Mr. McSorley to pay him back the money he had advanced for him; and the testimony showed that there were congratulations extended by the receiver and others at the time of the sale to Mr. McSorley, for the reason that it was generally asserted and understood that the bid was in McSorley's interest and that all parties concerned were glad that he was able to obtain his goods again.

It is undoubtedly true, as contended for by respondent, that in an action of this kind the testimony on the part of the party claiming the trust in his behalf must be clear and convincing, and that the burden of proof rests upon him. Conceding this rule, we think it has been successfully met by the appellant, and that the overwhelming weight of authority is to the effect that the property in question was bought for the appellant, and that a trust was thereby created. This corroborating testimony is by disinterested witnesses whose reputation and standing are conceded. With the view we take of the testimony, then, a constructive trust was established. The property was bought by respondent to be held in trust for appellant, and the bill of sale was simply intended for respondent's security for the money advanced. In other words, he was appellant's trustee, and having wrongfully dispossessed himself of the property entrusted to him, he must answer to appellant for its value. The testi-

mony is conflicting on the question of whether the appellant was placed in possession of the goods, both parties claiming to have possession until the same were sold by the respondent; but the determination of that question is not material so far as the application of the statute of frauds is concerned, for constructive trusts, like resulting trusts, do not fall within the statute of frauds. Bispham's Principles of Equity (6th ed.), § 95; *Peterson v. Hicks*, 43 Wash. 412, 86 Pac. 634; *Borrow v. Borrow*, 34 Wash. 684, 76 Pac. 305.

Finding, then, that the respondent had dispossessed himself of the trust property, appellant's only effective remedy is an action for damages. What is the measure? It must be the market value of the goods taken at the time of the conversion, with interest from such time. Now, the invoice price of the goods was $3,629.42. Deducting from this amount $150, which represents goods sold between the time they were invoiced and the date of the purchase by respondent, we have $3,479.42, the invoice price of the goods at the date of the purchase. The appellant testified that these goods were worth one hundred cents on the dollar, and they might have been to him under the circumstances. But the testimony of disinterested witnesses, although they were respondent's witnesses, was to the effect that, to a purchaser who had to move the goods to some other locality, the fair market value would be from seventy to ninety per cent of the invoice price. Adopting the mean valuation of eighty per cent, we have an established value of $2,783.53, and deducting from this the amount of the purchase price, $1,769.25, after all proper deductions were made, the amount due to appellant was $1,014.28.

The judgment will be reversed, and the cause remanded with instructions to the lower court to enter a judgment in favor of the appellant for that amount, with legal interest from the date of the conversion of the goods by the respondent.

RUDKIN, CROW, CHADWICK, and MORRIS, JJ., concur.

[No. 8943. Department Two. February 7, 1911.]

WESTMORELAND COMPANY *et al.*, *Respondents*, v. E. W. HOWELL, *Appellant*.[1]

APPEAL—REVIEW—HARMLESS ERROR. In an action of unlawful detainer, it is not prejudicial error that the court refused to quash the writ of restitution, where the defendant had not been disturbed in his possession, and upon final judgment for plaintiff, appealed and gave a supersedeas bond conditioned that he would abide the judgment of the court.

ABATEMENT AND REVIVAL—ANOTHER ACTION PENDING—ANSWER—SUFFICIENCY. An answer pleading another action between the same parties involving the same matter is bad as a plea in abatement where it fails to allege that the same was pending when the action was commenced.

SAME—DECISION WITHOUT JUDGMENT—BAR. An answer pleading that another action between the same parties involving the same subject-matter had been tried and decided in favor of the defendant, and that findings were being prepared, is bad as a plea in bar, since no final judgment therein had been entered.

Appeal from a judgment of the superior court for King county, Tallman, J., entered March 8, 1910, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action for unlawful detainer. Affirmed.

John T. Mulligan, for appellant.

Shepard & Flett, for respondents.

RUDKIN, J.—On the 28th day of November, 1908, the Magnolia Heights Company, a corporation, executed a deed of certain lots and blocks in Magnolia Heights, a subdivision of the city of Seattle, to the plaintiff Thomas, and placed the same in escrow in the Scandinavian-American Bank to be delivered to the grantee upon the payment of the purchase price of $135,000 and interest, according to the terms and conditions of a written agreement between the

[1]Reported in 113 Pac. 281.

vendor and the purchaser bearing the same date. The agreement in question contained many stipulations and conditions, none of which are material here, beyond the fact that it conferred the right of possession on the grantee. On the 10th day of March, 1909, Thomas and wife assigned all their right, title, and interest in the above agreement, except the commissions on sales to be made under its provisions, to the plaintiff Westmoreland Company, a corporation.

In the month of February, 1909, the plaintiff Thomas entered into negotiations with one L. E. Campbell for the sale of the lot now in controversy. The purchase price of $1,750 was agreed upon, and it was further agreed that upon a cash payment of $375, to procure the release of an existing mortgage covering this and other property, Thomas would procure a deed for the lot from his vendor and permit Campbell to place a first mortgage thereon to raise money for building purposes, and himself take a second mortgage to secure the balance due on the purchase price. No contract of sale was entered into at that time, for the reason that Campbell did not have the funds at hand to make the initial payment of $375, but Campbell represented that he had just arrived from San Francisco and did not bring his capital with him, that his partner would send him funds from time to time as needed, and asked that he be permitted to enter upon the construction of a building on the lot at once. This permission was given, with the express understanding that no contract for the sale of the lot would be executed or delivered until the terms of the contract were complied with. Campbell proceeded at once to erect a house on the lot, and at the end of the first week borrowed $150 from Thomas to pay the labor claims against it, representing that his funds had not yet arrived from San Francisco. At the same time he assigned all his right, title, and interest in the house and premises to secure the repayment of this advancement. One hundred dollars additional was advanced at the end of the second week and a like amount at the end of the third week, under sub-

stantially similar circumstances and representations. This last advancement was made with the distinct understanding that Campbell should relinquish any and all right or claim he might have in the premises, and was accepted on these terms, but with the understanding that Thomas would convey the lot to him for the original purchase price, together with all advancements theretofore or thereafter made. Thereafter Thomas made further advancements to the amount of $455, and there are still outstanding lienable claims against the property to the amount of approximately $1,000.

So far as the record discloses, Campbell made no disbursements for either labor or material on account of the construction of the building or on account of the purchase price. At a later day an attempt was made to close the deal between the parties through an agreement under which Thomas was to obtain a deed for Campbell from the Magnolia Heights Company, and Campbell was to give a mortgage on the lot for $1,200 to raise money to reimburse Thomas, and give a second mortgage to Thomas for the balance due on the purchase price, but these negotiations failed through the inability of the parties to procure a release of the existing mortgage on the lot. Thereafter Campbell entered into possession of the property without the permission of the owner and was served with notice to quit. Campbell quitclaimed to the defendant Howell, who likewise entered into possession of the premises without the permission of the owner, and on his failure to surrender possession, after three days' notice in writing, the present action was instituted under the forcible entry and unlawful detainer statutes of the state.

The original complaint contained two causes of action. The one for forcible entry under Rem. & Bal. Code, § 810, the other for unlawful detainer under Rem. & Bal. Code, § 834. On motion of the defendant the court required the plaintiffs to elect between the two causes of action thus stated, and the plaintiffs thereupon elected to stand on the action for unlawful detainer, and the complaint was amended

accordingly. The defendant then moved the court to quash the writ of restitution in the case, on the ground that the plaintiffs were not entitled to a restitution of the premises until after final judgment, under the cause of action set forth in the amended complaint. This motion was denied. At the commencement of the trial the defendant asked leave to file an amended or supplemental answer, the material parts of which are as follows:

"That since the filing of the former pleadings in said cause and since said cause was set for trial, that, to wit: On the 29th day of January, 1910, in Department 8 of this court before the Honorable C. H. Neal, judge, after a trial had, wherein there was an issue on a cross-bill between the plaintiff herein and defendant's grantor L. E. Campbell, in an action entitled 'the Robertson Mortgage Co., plaintiff, vs. Magnolia Heights Company, W. H. B. Thomas, Jessica Thomas, his wife, Westmoreland Company, L. E. Campbell, et al., defendants, being court case No. 68,038, the said court in giving its decision in said cause, and with full jurisdiction of the parties herein and the subject-matter of this suit, adjudged the defendant herein to be the legal owner and entitled to the possession of the premises described in the complaint herein as against the plaintiffs herein. That said judgment has not as yet been formerly signed and filed, but together with the findings of fact and conclusions of law is being prepared by the attorneys. That the decision as given orally was taken by the stenographer and is now transcribed and typewritten."

Leave to file the supplemental answer was denied, and the case came on for trial before the court without a jury. The court entered its findings of fact and conclusions of law, and gave judgment in favor of the plaintiffs, from which the defendant has appealed.

The first error assigned is based on the refusal of the court to quash the provisional writ of restitution. The appellant has not been disturbed in the possession of the property under the writ and has given a supersedeas bond conditioned that he will abide the judgment of this court. If the

judgment on the merits is correct, the quashing of the original writ of restitution would avail the appellant nothing, and the ruling of the court was not prejudicial. The refusal of the court to permit the filing of the supplemental answer is next assigned as error. There was no error in this ruling. The answer was insufficient either as a plea in abatement or as a plea in bar. It was not good as a plea in abatement because it failed to allege that the other action was pending at the time of the commencement of this action, 1 Ency. Plead. & Prac. 752, and it was not good as a plea in bar because no final judgment had been entered in the former action; *Anderson v. Burgoyne*, 60 Wash. 511, 111 Pac. 777.

The remaining assignments of error go to the sufficiency of the complaint and to the sufficiency of the evidence to sustain the judgment. What we have already said in the statement of the case sufficiently shows that the appellant and his grantor never acquired any right, title, or interest in the property, that the right of possession was in the respondents, and that the finding of the court, that "As between the plaintiffs and the defendant plaintiffs had superior title," is fully supported by the testimony.

The judgment is therefore affirmed.

DUNBAR, C. J., CHADWICK, MORRIS, and CROW, JJ., concur.

[No. 8985. Department Two. February 7, 1911.]

FRANK KAIN, *Appellant*, v. F. S. SYLVESTER *et al.*, *Respondents*.[1]

JUDGMENT—DEFAULT—VACATION—MISTAKE. It is not an abuse of discretion to set aside a default judgment for mistake, under Rem. & Bal. Code, § 303, where the defendant had consulted with, and believed in good faith that he had employed, a lawyer to defend the action, although the attorney denied the employment.

WORK AND LABOR—CONTRACT—PLEADING AND PROOF—GENERAL DENIAL. In an action for services under a joint contract of employment, it is competent, under a general denial, to disprove the contract alleged by showing a different contract whereby the plaintiff was employed by only one of the defendants.

WORK AND LABOR—CONTRACT—EVIDENCE—SUFFICIENCY. In an action for services on an alleged joint contract, the evidence supports findings that the plaintiff, a stockholder, was employed by a corporation alone, when he had been employed by it in the same capacity during two seasons and the other defendants merely acted in their official capacity as officers of the corporation.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered February 21, 1910, upon findings in favor of certain of the defendants, after a trial on the merits before the court without a jury, in an action on contract. Affirmed.

Bo Sweeney, for appellant.

Dorr & Hadley, for respondents.

RUDKIN, J.—Between the 26th day of July, 1906, and the 5th day of November, 1907, the plaintiff, Kain, and one Wilson were engaged in prospecting for oil on certain claims in the territory of Alaska. The present action was instituted by the plaintiff in his own behalf and as assignee of Wilson to recover the contract price of their services. The complaint alleged a joint employment of the plaintiff and his assignor by the defendants Sylvester, Giffin, Bowser,

[1]Reported in 113 Pac. 573.

Hammond, and the Cook Inlet Development Company. The defendants Bowser and Hammond were not served with process and made no appearance in the action. The defendant Sylvester appeared and answered, and a default was declared and entered against the defendants Giffin and the Cook Inlet Development Company. Later the default against Giffin was set aside on motion and he was permitted to file an answer. The trial resulted in a judgment against the Cook Inlet Development Company, by reason of its default, and a judgment in favor of the individual defendants Sylvester and Giffin. From the judgment in favor of the latter, the plaintiff has appealed.

The setting aside of the order of default against the respondent Giffin is the first error assigned. Process was served on this respondent June 20th, 1909, and the default was declared and entered on the 14th day of September, 1909. On October 30, 1909, a motion to set aside the default was interposed, supported by affidavits and opposed by counter affidavits. It appears from the affidavit of the respondent that, soon after the service of the summons and complaint upon him, he consulted with an attorney in the city of Seattle in reference to the case, and supposed that he had employed such attorney to represent him in the action. In a counter affidavit filed by the attorney the employment is denied, and whether there was such an employment is very questionable, but the fact of employment is not decisive of the question now before us. If the respondent believed in good faith that he had employed an attorney to appear in the action and consulted him for that purpose, it was within the province and discretion of the trial court to permit him to appear and defend the action after the time limited by law, even though he were mistaken. Rem. & Bal. Code, § 303, contemplates such mistakes as this, and no abuse of discretion appears.

The next assignment of error is based on the admission of testimony on cross-examination of the appellant's witnesses

and on the direct examination of the respondents' witnesses, tending to show that the contract of employment was entered into by and on behalf of the defendant corporation alone, and not on behalf of the individual respondents. The apparent basis of the objection to this class of testimony is the fact that no such contract was pleaded in the answer. But the answer denied the joint contract of employment set forth in the complaint, and under such denial it was clearly competent to prove another and different contract for the purpose of disproving the contract as alleged. Such has been the uniform holding of this court. *Puget Sound Iron Co. v. Worthington*, 2 Wash. Ter. 472, 7 Pac. 882, 886; *Trumbull v. Jackman*, 9 Wash. 524, 37 Pac. 680; *Williams v. Ninemire*, 23 Wash. 393, 63 Pac. 534; *Peterson v. Seattle Traction Co.*, 23 Wash. 615, 63 Pac. 539, 65 Pac. 543, 53 L. R. A. 586; *Armstrong v. Musser Lumber & Mfg. Co.*, 43 Wash. 584, 86 Pac. 944.

The remaining assignments of error are based on the insufficiency of the evidence to sustain the findings and judgment. In so far as the assigned claim is concerned, the testimony is all but conclusive that Wilson was employed by the corporation alone and was at all times fully conscious of that fact. He was a stockholder in the corporation and had represented it in the same capacity during the seasons of 1904 and 1905. He had purchased supplies in the name of the corporation, received checks from the corporation, addressed letters to the corporation, and on his return in 1907 presented his bill to the corporation. On the other hand, there is no testimony worthy of the name tending to fix individual liability on the individual respondents, who were at all times acting in their representative capacity as vice president and secretary-treasurer of the corporation defendant. The testimony is not so clear and satisfactory as to the individual claim of the appellant, but it nevertheless appears that he was employed by Wilson, and in contracting for his services Wilson represented the corporation and not its offi-

cers as individuals. The testimony offered tending to show an employment by the respondent Giffin as an individual is meager and unsatisfactory, and from a full consideration of the record we are satisfied with the findings and conclusions of the court below.

Its judgment is accordingly affirmed.

DUNBAR, C. J., CROW, MORRIS, and CHADWICK, JJ., concur.

[No. 9043. Department Two. February 7, 1911.]

CHARLEY CRAWW, *Respondent*, v. PHOENIX LOGGING COMPANY, *Appellant*.[1]

MASTER AND SERVANT—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—SIGNALS AND WARNING—QUESTION FOR JURY. The negligence of the master and the contributory negligence of a swamper in a logging camp, who was struck while cutting a tree in the bight of the cable, is for the jury, where it was customary, in hauling in the logs to the landing, for the signalman to give notice by a blast of a whistle, thereby enabling the swamper to get out of the way of the cable, and instead of doing so, he gave the engineer a signal by hand.

Appeal from a judgment of the superior court for King county, Main, J., entered June 2, 1910, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a swamper in a logging camp. Affirmed.

Roberts, Battle, Hulbert & Tennant, for appellant.

Heber McHugh and *John T. Casey*, for respondent.

RUDKIN, J.—This was an action to recover damages for personal injuries. The defendant company is engaged in the logging business, and at the time of receiving the injuries complained of, the plaintiff was in its employ as a swamper in one of its logging camps. In the prosecution of its business

[1]Reported in 113 Pac. 266.

the defendant had constructed a railroad through the timber, and landings were built from place to place for the purpose of loading the logs onto the cars. On the 8th day of September, 1909, a logging crew, consisting of the engineer, the fireman, the hook tender, the assistant hook tender, the signalman, and the plaintiff as swamper, were engaged in hauling logs from the timber to one of these landings for the purpose of loading. The donkey engine was stationed near the landing, and the logs were hauled to the landing from the timber by means of a cable four or five hundred feet in length. The signalman was stationed near the cable, about 150 feet from the engine, and signaled the engineer to start and stop the engine, by means of a wire attached to the engine's whistle. When a log was attached to the cable out in the woods, the hook tender or his assistant would halloo to the signalman to go ahead, and the signalman would thereupon communicate the signal to the engineer by a single blast of the whistle. It was the duty of plaintiff as swamper to cut brush, trees, and other obstructions in the way of the logs whenever it became necessary, and there was at least one well-known danger incident to this work while the cable was in motion drawing a log to the landing. For at such times the cable will sway from side to side, and if it catches on a snag or other obstruction it will form what is commonly called a bight in the line, and if the obstruction yields or gives way the line will straighten and cause serious injury to any person who may happen within it reach. At the time of receiving the injury complained of, the plaintiff was in the act of cutting a small tree within about three feet of the cable and got within the bight of the line, when the line straightened, striking him in the side and causing the injury complained of. From a judgment in favor of the plaintiff, the defendant has prosecuted this appeal.

The principal assignment of error is based on a denial of a challenge to the legal sufficiency of the testimony, and the

denial of a motion for judgment notwithstanding the verdict, on the ground that the testimony failed to show actionable negligence on the part of the appellant, and on the further ground of contributory negligence and assumption of risk on the part of the respondent. A correct determination of these rulings depends upon the solution of a single question. If it was the duty of the respondent to look out for his own safety, and if he had no right to rely on the signals given by the signalman to start and stop the engine, he was clearly guilty of contributory negligence or assumed the risk in getting within the bight of the line while the cable was in motion. If, on the other hand, the respondent had a right to rely on such signals for his protection, and the engine was started without the usual and customary signal, which is the negligence charged in the complaint, we think a right of action was shown, for on these questions there was a direct conflict in the testimony. The testimony shows quite satisfactorily that it was the custom to start the engine only after the whistle was sounded, and that it was started in this instance by the signalman simply raising his hand. There was not only negative testimony tending to show that no whistle was sounded, but direct and affirmative testimony that the signal was given by the hand as indicated. For these reasons there was no error in the rulings complained of.

The appellant contends that the respondent saw the cable in motion immediately before his injury, and that a further signal would not avail him, but we are not prepared to say that such was the case. The respondent is a foreigner, with a very imperfect understanding of the English language, and testified through an interpreter. For this reason mistakes and apparent conflicts in his testimony should not be construed too strongly against him. A careful examination of his entire testimony convinces us that the jury were warranted in finding that the failure to sound the whistle before starting the engine was the proximate cause of the accident, that such act constituted negligence on the

part of the master, and that the respondent was not guilty of contributory negligence and did not assume the risk of dangers arising from the neglect of the master.

Many errors are assigned in the giving and refusing of instructions, but it seems to us that the simple issue in the case was fully covered by the charge of the court as given, and that the substantial rights of the appellant were safeguarded and protected. The judgment is therefore affirmed.

DUNBAR, C. J., CROW, MORRIS, and CHADWICK, JJ., concur.

[No. 9172. Department Two. February 7, 1911.]

MATTIE LECLAIRE, *Respondent*, v. TACOMA RAILWAY & POWER COMPANY, *Appellant*.[1]

CARRIERS—PASSENGERS—WHO ARE—REFUSAL TO PAY FARE. Street car passengers who had paid fare and were entitled to ride to the end of the line are not entitled to ride in any and all cars, and upon voluntarily leaving a car before reaching their destination, they cease to be passengers and are entitled to ride in another car only by payment of another fare.

SAME—BREACH OF CONTRACT BY CARRIAGE—EXCUSE. The fact that thirty or forty persons boarded a street car and refused to pay fare, and that the employees were unable to eject them, does not excuse the company for breach of contract to carry to her destination a passenger whom the company had received on the car for such transportation, and who had paid her fare.

SAME—DELAYS—DEGREE OF CARE. A street car company must exercise only ordinary care to guard against delays by the illegal acts of third persons.

CARRIERS—BREACH OF CONTRACT—DAMAGES — EXCESSIVE VERDICT. A verdict for $1,000, reduced by the trial judge to $750, is grossly excessive and should be reduced to $100, where the plaintiff, a passenger on a street car, was delayed and refused transportation from about seven o'clock in the evening until one o'clock a. m., and reached home by team about three o'clock, only suffering inconvenience and a slight cold and loss of one day's time; and it is immaterial that the costs of appeal in the case amount to approximately $250, since the amount was exclusively in her control.

[1]Reported in 113 Pac. 268.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered March 28, 1910, upon the verdict of a jury rendered in favor of the plaintiff for $750 for breach of contract of carriage. Reversed, unless $650 is remitted.

B. S. Grosscup and *W. C. Morrow*, for appellant, contended, among other things, that, under the circumstances, the railway company was excused from failure to operate its through cars, and there was, therefore, no breach of duty owing to the plaintiff. *Geismer v. Lake Shore & M. S. R. Co.*, 102 N. Y. 563, 7 N. E. 828, 55 Am. Rep. 837; *Sterling v. St. Louis etc. R. Co.*, 38 Tex. Civ. App. 451, 86 S. W. 655; *Pittsburg etc. R. Co. v. Hagen*, 84 Ill. 36, 25 Am. Rep. 422; *Lake Shore & M. S. R. v. Bennett*, 89 Ind. 457, 6 Am. & Eng. R. R. Cas. 391; *Bartlett v. Pittsburgh etc. R.*, 94 Ind. 281; *Pittsburgh etc. R. v. Hallowell*, 65 Ind. 188, 32 Am. Rep. 63. The carrier was required merely to use ordinary care in the protection of its passengers. 4 Elliott, Railroads (2d ed.), § 1639; 3 Thompson, Negligence, § 34; 6 Cyc. 604; *Bosworth v. Union R. Co.*, 26 R. I. 309, 58 Atl. 982; *Tall v. Baltimore Steam Packet Co.*, 90 Md. 248, 44 Atl. 1007, 47 L. R. A. 120; *Pennsylvania R. Co. v. MacKinney*, 124 Pa. 462, 17 Atl. 14, 10 Am. St. 601, 2 L. R. A. 820; *Thomas v. Philadelphia etc. R. Co.*, 148 Pa. St. 180, 23 Atl. 989, 15 L. R. A. 416; *Chicago & A. R. Co. v. Pillsbury*, 123 Ill. 9, 14 N. E. 22, 5 Am. St. 483; *Kinney v. Louisville & N. R. Co.*, 99 Ky. 59, 34 S. W. 1066; *Pounder v. N. E. R. Co.*, (1892) 1 Q. B. 385; *Pittsburg etc. R. Co. v. Hinds*, 53 Pa. St. 512, 91 Am. Dec. 224; *Batton v. South & North Alabama R. Co.*, 77 Ala. 591, 54 Am. Rep. 80. The verdict was grossly excessive. *Cunningham v. Seattle Elec. R. Co.*, 3 Wash. 471, 28 Pac. 745; *Shannon v. Northern Pac. R. Co.*, 44 Wash. 321, 87 Pac. 351; *Davis v. Tacoma R. & Power Co.*, 35 Wash. 203, 77 Pac. 209, 66 L. R. A. 802; *Finch v. Northern Pac. R. Co.*, 47 Minn. 36, 49 N. W. 329; *Olson v.*

Northern Pac. R. Co., 49 Wash. 626, 96 Pac. 150, 18 L. R. A. (N. S.) 209.

Govnor Teats, *Hugo Metzler*, *Leo Teats*, and *A. A. Howell*, for respondent.

RUDKIN, J.—The defendant railway company owns and operates a street railway system in the city of Tacoma, and also suburban lines running to Puyallup, Spanaway, and other points without the city limits. The regular fare between points within the city limits is five cents, while to points beyond the city an additional fare is collected, depending upon the distance traveled. Prior to the 17th day of December, 1909, what is styled in the record the Fern Hill district was without the corporate limits of the city of Tacoma, and the regular fare from any point in the city to Fern Hill was ten cents. On that day the Fern Hill district became a part of the city of Tacoma by annexation, and a controversy arose between the street railway company and the residents of Fern Hill as to the proper and legal rate of fare between points within the old city limits and Fern Hill, the former contending that it was still entitled to collect the old fare of ten cents, while the latter contended that five cents was the proper and legal fare between all points within the corporate limits of the city as extended, which would include the Fern Hill district. On the last named date the residents of Fern Hill asserted their right to be carried from the city of Tacoma to their homes for a five-cent fare, and the railway company asserted its right to collect the old fare of ten cents. To enforce its policy and to enable it to collect the old rate, the company collected from all passengers from the city on its suburban lines a five-cent fare, for which it carried them to a point called Midway, the old city limits. At this point it sought to collect from the residents of Fern Hill, and other points without the old city limits, the additional fare to the place of destination, and if the passen-

gers refused to pay, the company refused to transport them further.

The adoption of this policy resulted in more or less strife between the company and its patrons, and between 6 and 7 o'clock in the evening of that day a crowd, estimated at from one to two thousand people, assembled at or in the vicinity of Midway, a majority of whom had been carried there by the railway company and refused further transportation for failure to pay additional fare. The plaintiff took a car from the city at about 6:25 p. m. for the purpose of returning to her home at Spanaway. There was no controversy between the plaintiff and the railway company over the fare to that point, which had been fifteen cents, and was not affected by the change in the city limits. The company accepted her as a passenger to Spanaway, but only collected a five-cent fare, which would carry her to Midway, stating that the balance of the fare would be collected at that point. On the arrival of the car at Midway, the residents of Fern Hill aboard the car refused to pay further fare, and thirty or forty other persons who boarded the car at that point likewise refused to pay further fare. The employees of the company were unable to collect the additional fare from these Fern Hill passengers, and were also unable to eject them from the car for refusal to pay, and in consequence of such inability the car was backed onto a siding at Alki, a few blocks from Midway, where it remained until 1 o'clock the next morning, with the plaintiff still on board. At that hour she was able to obtain transportation to her home at Spanaway by means of a team and wagon, where she arrived about two hours later. This action was thereafter instituted to recover damages for breach of the contract of carriage; and from a judgment in favor of the plaintiff in the sum of $750, this appeal is prosecuted.

The three principal contentions urged in favor of a reversal of the judgment are the following: First, that the refusal of other passengers to pay their fare or leave the car,

coupled with the inability of the employees of the company to eject them for such refusal, justified the appellant in refusing to proceed further with the car, and excused its breach of contract with the respondent; second, that the appellant was prevented from carrying out its contract of carriage with the respondent by the unlawful acts and interference of the mob or assemblage at Midway; and third, that excessive damages were allowed under the influence of passion and prejudice. On the first question thus presented there is no material conflict in the testimony. The Fern Hill passengers on the car on which the respondent was a passenger refused to pay the additional fare demanded at Midway, and a large number of persons claiming the right to transportation to Fern Hill likewise boarded the car at Midway and refused to pay fare. It also clearly appears that the persons or passengers refusing to pay fare were so numerous that the employees of the company were unable to eject them from the car, and had no alternative except to carry them free of charge or refuse to proceed further.

We held in the recent case of *Peterson v. Tacoma R. & Power Co.*, 60 Wash. 406, 111 Pac. 338, that the legal rate of fare from points within the city of Tacoma to Fern Hill was five cents on that date, but that is a question of minor importance on this appeal. Those who took passage from the city of Tacoma for Fern Hill on the car on which the respondent was a passenger were entitled to be carried to their destination for five cents, and the refusal of the appellant to so carry them was wrongful and inexcusable, but those who boarded the car at Midway without the payment of fare were not passengers, and their conduct finds no warrant or authority in law. For, assuming that they had paid a five-cent fare in the city of Tacoma and thus became entitled to transportation to Fern Hill, the payment of such fare did not entitle them to transportation on any and all cars that might pass over the road. As soon as the appel-

lant refused to transport them beyond Midway there was a breach of the contract of carriage for which the appellant became liable in damages, but when they voluntarily left the car in which they were riding, they ceased to be passengers and could only become such on another car by the payment of another fare. *Kirk v. Seattle Elec. Co.*, 58 Wash. 283, 108 Pac. 604.

As to all those who boarded the car at Midway and refused to pay fare, the refusal of the railway company to transport them was therefore rightful, but whether this alone would excuse a breach of the contract of carriage between the appellant and the respondent presents an entirely different question. In our opinion it would not. The appellant undertook to carry the respondent to Spanaway, and the mere fact that it was or might be compelled to carry thirty or forty other persons free of charge, for whose conduct the respondent was in nowise answerable, would not and should not discharge it from its obligation. We do not desire to be understood as holding that the appellant was under obligation to operate its road continually or indefinitely under such circumstances, but so long as it received passengers for transportation to a given point, it became obligated to perform its contract and public duty, unless it was prevented from so doing by something far more serious than the loss of $2 or $3 in fares from persons who wrongfully insisted on free transportation.

On the second question, it would seem clear that the appellant is not liable in damages for failure to transport the respondent to her distination if such failure was caused by the wrongful acts or interference of third persons, and we do not understand that the respondent contends for a contrary doctrine. She does contend, however, that there was no testimony to sustain this defense, or rather that the testimony offered to sustain it was incredible and false, but this was clearly a question for the jury. We are further of opinion that a carrier is only required to exercise ordinary care and

prudence to guard and protect its passengers against delays caused by the wrongful or illegal acts of third persons. *Fewings v. Mendenhall*, 88 Minn. 336, 93 N. W. 127, 97 Am. St. 519, 60 L. R. A. 601.

The foregoing discussion of the two first questions will be a sufficient guide for the court below upon a retrial of the action, which must be awarded on other grounds, and an examination or discussion of the instructions given or refused at this time would serve no useful purpose. If there was no obstacle in the way of transporting the respondent to her destination, except the refusal of certain persons or passengers to pay fare or leave the car, the appellant is liable in damages for the injury suffered and sustained through its failure in that regard. If the failure to transport her was caused by the wrongful acts or misconduct of third persons, which reasonable care and prudence on the part of the appellant would not have avoided or guarded against, the respondent must seek her remedy against the wrongdoers, whose acts were the direct and proximate cause of her injury.

It requires no argument, aside from a mere statement of the facts, to convince one that the original verdict of $1,000 in this case was grossly excessive and was founded in passion and prejudice. The respondent left the city of Tacoma at about 6:30 in the evening and should have arrived at her home at Spanaway in the neighborhood of 7 o'clock; instead of that, she was compelled to remain in the car at Alki until 1 o'clock the following morning, and did not reach her home until two hours later. She doubtless suffered some inconvenience and annoyance from the cold and from loss of sleep, but beyond this there was no actual damage. She lost one day's time and took a slight cold, which caused no considerable inconvenience so far as the record discloses. It seems to us that $100 would be a liberal award for all damages sustained, and that any sum in excess of that amount would be a wanton confiscation of the appellant's property. Should the appellant offer that sum as a premium or reward to all

who would undertake the same trip under the same circumstances with the same results, it is needless to say that its facilities would be overtaxed. Spanaway would at once become a Mecca, and Tacoma and vicinity would be well-nigh depopulated. It is said that the cost of this appeal, with its record of approximately 500 pages, will amount to or exceed the sum of $250, but with that question we have no concern. The appellant should not be penalized because the respondent demanded, and a jury and trial court awarded, far more than she was entitled to. That question was within her exclusive control. For the above error the judgment is reversed and a new trial ordered, unless the respondent remits from the judgment all sums in excess of one hundred dollars and the costs in the court below, within thirty days after the remittitur is returned to that court.

DUNBAR, C. J., CROW, CHADWICK, and MORRIS, JJ., concur.

[No. 9280. Department Two. February 7, 1911.]

MARGARET BEEBE, *Respondent*, v. NORTHWESTERN DAIRY COMPANY, *Appellant*[1]

CORPORATIONS—ACTIONS AGAINST—PARTIES—IDENTITY—ANSWER—SUFFICIENCY—QUIETING TITLE. Where the complaint in an action to quiet title alleged that defendant was a domestic corporation, it is error to sustain a demurrer to an answer and cross-complaint alleging that the defendant was a foreign corporation and setting up its title to the property, and to strike the answer, on the ground that the foreign corporation was not a party to the action; since it seems that there was but one corporation, and if served with process, the foreign corporation had an undoubted right to defend the action.

Appeal from a judgment of the superior court for King county, Webster, J., entered June 28, 1910, in favor of the plaintiff, upon sustaining a demurrer to the answer and cross-

[1]Reported in 113 Pac. 573.

complaint and a motion to strike the answer, in an action to quiet title. Reversed.

Byers & Byers, for appellant.

Bo Sweeney, for respondent.

RUDKIN, J.—The record in this case presents a peculiar state of facts. The action was instituted against the Northwestern Dairy Company, alleged to be a corporation organized and existing under the laws of this state, to remove a cloud from the title to certain real property in King county, arising from or caused by an execution sale and sheriff's deed. The answer of the defendant consisted of denials and a cross-complaint, alleging title in the defendant under the execution sale and sheriff's deed, and praying judgment for the restitution of the premises and for damages for use and occupation. The cross-complaint further alleged that the defendant was a corporation organized and existing under the laws of the state of Oregon, and had filed its articles of incorporation in the office of the secretary of state in this state, and paid its annual license fee last due. A demurrer to the answer and cross-complaint was interposed on the ground, among others, that the Oregon corporation was not a party to the action. This demurrer was sustained, and thereafter a motion to strike the same answer on the same ground was interposed and sustained. What there was left to strike, after the demurrer to the answer was sustained, we are not advised, but such is the state of the record brought here. After striking the answer, the court gave judgment against the Oregon corporation for costs, and from that judgment, the present appeal is prosecuted.

A motion to dismiss the appeal was interposed in this court on the ground that no notice of the appeal was served on the Washington corporation, but that motion was denied, for the reason that, in the opinion of this court, there was but one corporation in the case. *Beebe v. Northwestern Dairy Co.*, 61 Wash. 294, 112 Pac. 365. That decision is also de-

cisive of the question here presented. For if there was but one corporation, it was error to sustain the demurrer and strike the answer on the ground that there were two separate and distinct coporations. Of course, if it should appear on the trial that there was a Washington corporation, and that corporation was sued and served with process, the Oregon corporation has no standing in court. But if it should appear, as seems to be the fact, that there is but one corporation, and that corporation is the Oregon corporation doing business in this state, and that corporation was sued and served with process, it has a clear and unquestionable right to appear and defend the action.

The judgment is therefore reversed, and the cause remanded with directions to overrule the demurrer and the motion to strike, and for further proceedings in the cause not inconsistent with this opinion.

DUNBAR, C. J., CHADWICK, CROW, and MORRIS, JJ., concur.

[No. 9358. Department Two. February 7, 1911.]

THE STATE OF WASHINGTON, *on the Relation of T. V. Davis, Plaintiff*, v. THE SUPERIOR COURT FOR FRANKLIN COUNTY *et al., Defendants.*[1]

ELECTIONS—CONTESTS — APPEAL — BOND — SUPERSEDEAS. Under Rem. & Bal. Code, § 4956, providing for an appeal to the supreme court from a judgment in an election contest, "as in other cases," the appeal does not supersede the judgment unless a supersedeas bond is given as in other cases; § 4957 declaring that the certificate of election shall be rendered null and void by a judgment cancelling the same where no appeal is taken within ten days, merely makes the judgment a finality within that time if no appeal is taken, and does not give the appeal the effect of superseding the judgment without bond.

[1]Reported in 113 Pac. 277.

Application filed in the supreme court January 12, 1911, for a writ of prohibition to restrain the superior court for Franklin county, Kennan, J., from further proceeding with the trial of a cause. Denied.

Horrigan, Coad, Driscoll & Leonard, for relator, to the point that the judgment was superseded by the appeal, cited: Black, Judgments, § 248; Rem. & Bal. Code, § 4957; *Fawcett v. Superior Court*, 15 Wash. 342, 46 Pac. 389, 55 Am. St. 894; *State ex rel. McDonald v. Superior Court*, 6 Wash. 112, 32 Pac. 1072; *Brundage v. Home Sav. & L. Ass'n.*, 11 Wash. 288, 39 Pac. 669; *Foster v. Superior Court etc. of San Francisco*, 115 Cal. 279, 47 Pac. 58; *Day v. Gunning*, 125 Cal. 527, 58 Pac. 172; *Covarrubias v. Board of Supervisors*, 52 Cal. 622; *Morton v. Broderick*, 118 Cal. 474, 50 Pac. 644.

H. B. Noland, for defendants, cited, among others: 9 Cyc. 12, 32; 2 Cyc. 892, 895, 984; Rem. & Bal. Code, §§ 1722, 4956; Spelling, Injunctions & Extr. Rem. (2d ed.), § 1131; High, Extraordinary Remedies (2d ed.), § 756; *Fitzsimmons v. Board*, 119 Mich. 147, 77 N. W. 632; *Ex parte Robertson*, 44 Tex. Cr. 566, 72 S. W. 859; *State ex rel. Busch v. Dillon*, 96 Mo. 56, 8 S. W. 781; *Anderson v. Comptois*, 111 Fed. 998; *Central Nat. Bank v. Graham*, 118 Mich. 488, 76 N. W. 1042; *People ex rel. Day v. Bergen*, 53 N. Y. 404; *In re Faber*, 13 S. D. 62, 82 N. W. 398; *Gilmore v. Baker Co.*, 14 Wash. 52, 44 Pac. 101; *Fylpaa v. Brown County*, 6 S. D. 634, 62 N. W. 962; *Fawcett v. Superior Court*, 15 Wash. 342, 46 Pac. 389, 55 Am. St. 894; *Jayne v. Drorbaugh*, 63 Iowa 711, 17 N. W. 433; *Allen v. Robinson*, 17 Minn. 113; *State ex rel. Hunt v. Mayor etc. of Kearney*, 28 Neb. 103, 44 N. W. 90; *State ex rel. Lewis v. Comr's Marion County*, 14 Ohio St. 515; *Ewing v. Thompson*, 43 Pa. St. 372; *State ex rel. Dodson v. Meeker*, 19 Neb. 444, 27 N. W. 427; *Central Nat. Bank v. Graham*, 118 Mich. 488, 76 N. W. 1042; *State ex rel. Craig v. Woodson*, 128 Mo. 497, 31 S.

W. 105; *State ex rel. Wagenseil v. Stevenson*, 98 Mich. 218, 57 N. W. 115.

RUDKIN, J.—At the last general election held on the 8th day of November, 1910, the relator, T. V. Davis, and one J. W. Hays were rival candidates for the office of sheriff in Franklin county of this state. A canvass of the vote showed 522 votes for the relator against 515 votes for his opponent, and a certificate of election was duly issued to the former by the county auditor on the 18th day of November, 1910. On the same day the relator qualified by taking the oath prescribed by law. Thereafter, and within the time limited by law, a statutory contest was instituted by Hays against the election of the relator, the particular grounds of which are not at this time material. On the hearing of the contest the court found that the plaintiff, Hays, received 531 votes and the relator, Davis, 514 votes, and gave judgment declaring, "that plaintiff, J. W. Hays, was elected to the office of sheriff of Franklin county, Washington, at the general election held November 8, 1910, and the said plaintiff is entitled to take and hold said office of county sheriff for said county for the term of 2 years commencing on the 9th day of January, 1911, and the certificate of election issued by the county auditor of said county to the defendant should be and the same hereby is cancelled and decreed to be void, and of no force and effect, and the returns of said election should be and they hereby are corrected and made to conform to the actual and true count of the ballots actually voted and as tallied by the court in the findings filed herein."

This judgment was entered of record on the 7th day of December, 1910, and on the 12th day of December following, the relator gave written notice of appeal therefrom to this court, and filed the common form of cost bond in the sum of $200. On the 9th day of January, 1911, the plaintiff in the contest proceeding qualified as sheriff and entered upon the discharge of his duties as such. On the following day he

presented to the court an affidavit or complaint charging and alleging that the defendant in the contest proceeding, the relator herein, refused to surrender up the office of sheriff in obedience to the judgment of the court, and prayed that he be cited to appear and show cause, if any he had, why he should not be punished as for a contempt. The relator appeared in obedience to the citation and objected to the jurisdiction of the court, but his objection was overruled, and the matter was set for hearing on January 12, 1911. The relator thereupon applied to this court for a writ of prohibition to restrain the court below from further proceeding in the contempt matter, and the case is now before us for final determination on the return to the alternative writ heretofore issued by this court. The contentions of the respective parties in brief are these: The relator contends that the judgment in the contest proceeding was superseded by his appeal therefrom, while the defendants contend that such judgment is self-executing and cannot be stayed or superseded pending an appeal. Section 4956, Rem. & Bal. Code, relating to election contests, provides that, "Either party, feeling himself aggrieved by the judgment of said court, may appeal therefrom to the supreme court, as in other cases of appeal thereto."

The next section provides that "Whenever an election shall be annulled and set aside by the judgment of the superior court, when no appeal has been taken therefrom within ten days, such certificate or commission, if any have been issued, shall be thereby rendered void." If section 4956 stood alone it is manifest that an appeal would not operate as a supersedeas, unless a supersedeas bond was given and filed in an amount fixed by the court, under the general statutes governing appeals to this court. Rem. & Bal. Code, § 1722. The relator contends, however, that inasmuch as § 4957 expressly declares that the certificate or commission shall be rendered null and void by the judgment when no appeal has been taken therefrom within ten days, the converse of this must be true, and if an appeal is taken within the ten days the certificate or

commission is not rendered null and void, but remains of full force and effect. We cannot agree with this contention. The sole purpose of the latter section is to limit the time for prosecuting an appeal to the ten days specified, and not to supersede the judgment or effect its finality in any way. The moment the judgment is entered by a court of competent jurisdiction, the certificate or commission is rendered null and void, and so continues until the judgment is vacated or set aside. The declaration that it shall become null and void if no appeal is taken within the ten days means simply that, at the expiration of that time, the judgment becomes a finality and cannot be thereafter appealed from. For this reason we are clearly of opinion that a judgment such as was rendered by the court below in the contest case is not stayed or superseded by a simple appeal, but whether it is self-executing or can be stayed or superseded by the giving of a proper bond, we deem it unnecessary to inquire.

The alternative writ is therefore quashed.

DUNBAR, C. J., CHADWICK, MORRIS, and CROW, JJ., concur.

[No. 9067. Department One. February 9, 1911.]

JOSEPH MATZGER, *Appellant*, v. F. E. PAGE, *Respondent*.[1]

APPEAL—REVIEW—FINDINGS. Findings upon conflicting evidence will not be disturbed on appeal where the trial court heard and saw most of the witnesses and the evidence abundantly supports the findings.

BILLS AND NOTES—MATURITY—OPTION OF PAYEE—WAIVER—TENDER. The option to hasten the maturity of a note, for nonpayment of interest, is for the benefit of the payee, and is waived unless exercised before tender of the amount due.

TENDER—SUFFICIENCY. As the law does not concern itself with trifles, a tender of $400 interest on a mortgage note is sufficient, without adding interest thereon for three days' intervening between its maturity and the date of tender.

[1]Reported in 113 Pac. 254.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered May 28, 1910, in favor of the defendant, after a trial on the merits before the court without a jury, in an action to foreclose a mortgage. Affirmed.

Leopold M. Stern (J. W. Russell and *W. H. B. Thomas*, of counsel), for appellant.

Thomas D. Page, for respondent.

PER CURIAM.—On the 9th day of October, 1908, the predecessors in title of defendant, F. E. Page, executed and delivered to plaintiff's assignor their promissory note for $5,000, payable on or before February 13, 1913, with interest at eight per cent per annum, payable annually. Upon the same date the makers of the note executed a mortgage upon certain real estate as security for its payment. The defendant, F. E. Page, became the owner of the mortgaged premises on October 20, 1908. The note provides that, if the interest is not paid when it becomes due, the whole sum of both principal and interest shall become "immediately due and collectible at the option of the holder" of the note. This suit was commenced on October 29, 1909, for the foreclosure of the mortgage. The complaint alleges that the interest which became due on October 9, 1909, has not been paid, and that on the 19th day of October following, the plaintiff elected to, and did, declare both the principal and interest immediately due. It is affirmatively alleged in the answer that the defendant, F. E. Page, through her agent, tendered to the plaintiff $400 in United States gold coin, the amount of the accrued interest, on the 12th day of October, 1909. The tender is denied in the reply. The tender was deposited in the registry of the court before the commencement of the trial. There was a judgment for the plaintiff for the amount of the tender less the amount of costs of the defendant, F. E. Page. The plaintiff has appealed. The defendant, F. E. Page, will hereafter be called the respondent. The appeal presents but two questions, one of fact and one of law.

The appellant earnestly insists that no tender was in fact made. On this question there is a conflict in the evidence. Two witnesses on behalf of the respondent testified that $400 in gold coin was tendered to the appellant on October 12, 1909, seventeen days before the commencement of the action. The appellant was not present in person at the trial, but stated in his deposition that the tender was not made. His testimony is inferentially corroborated by the testimony of another witness. The trial court saw and heard three of the witnesses testify, whilst we have nothing but the cold letter of the record before us. It is apparent from what has been said that the judgment is supported by abundant evidence. We will therefore accept it as conclusive upon the facts.

Recurring to the law of the case, it suffices to say that this court, in an unbroken line of decisions, has held that a provision in a note hastening the date of its maturity is for the benefit of the payee, and that he waives his option unless he exercises it before a tender of the amount actually due. *Coman v. Peters*, 52 Wash. 574, 100 Pac. 1002.

It is argued that the failure to tender the interest due upon the accrued interest for the three days intervening between its maturity and the date of the tender renders the tender ineffectual. This contention is without merit. The law does not concern itself with trifles. *Scott v. Patterson*, 1 Wash. 487, 20 Pac. 593.

The judgment is affirmed.

[No. 9052. Department One. February 10, 1911.]

ALTHAN ALDRICH *et al.*, *Respondents*, v. INLAND EMPIRE TELEPHONE & TELEGRAPH COMPANY, *Appellant*.[1]

APPEAL—REVIEW—HARMLESS ERROR. A verdict in favor of defendants cures error in refusing to sustain a challenge to the sufficiency of the evidence.

MALICIOUS PROSECUTION—MALICE—EVIDENCE — SUFFICIENCY. In actions against a corporation and its president for malicious prosecution, a finding of malice on the part of the corporation, although none was found against the president, is warranted, where it appears that he did not become president until long after the occurrence, other officers did not report all the facts to him, and he fully reported to the prosecuting attorney all the facts within his knowledge.

SAME—TRIAL—JUDGMENT—JOINT TORT FEASORS. In actions for malicious prosecution against a corporation and its president, a verdict and judgment for the president does not exonerate the corporation where the prosecution was directed by the trustees

SAME—DAMAGES—COSTS OF DEFENSES. In an action for malicious prosecution, the cost of a transcript, paid after discharge, cannot be recovered as a necessary expense incurred in making plaintiff's defense.

SAME—PROBABLE CAUSE—EVIDENCE—ADMISSIBILITY. In an action for malicious prosecution, the admission in evidence of the magistrate's reasons for discharging the plaintiffs is prejudicial error, where want of probable cause is not conceded.

Appeal from a judgment of the superior court for Pierce county, Shackleford, J., entered August 11, 1910, upon verdicts of a jury rendered in favor of the plaintiffs, upon the trial of consolidated actions for malicious prosecution. Reversed.

Hayden & Langhorne, for appellant, contended, among other things, that the institution of a criminal action in good faith, for probable cause, and upon advice of reputable counsel, excuses a plaintiff from liability for damages in an action for malicious prosecution. 1 Am. & Eng. Ency. Law (2d

[1]Reported in 113 Pac. 264.

ed.), p. 809; 19 Am. & Eng. Ency. Law (2d ed), pp. 685, 687; Newell, Malicious Prosecution, 317, 318; Cooley, Torts, 211, 213; *Jordan v. Alabama G. S. R. Co.*, 81 Ala. 220, 8 South. 191; *Poupard v. Dumas*, 105 Mich. 326, 63 N. W. 301; *Bartlett v. Brown*, 6 R. I. 37, 75 Am. Dec. 675; *Alexander v. Harrison*, 38 Mo. 258, 90 Am. Dec. 431; *Le Clear v. Perkins*, 103 Mich. 131, 61 N. W. 357, 26 L. R. A. 627; *Murphy v. Larson*, 77 Ill. 172. The advice of a prosecuting attorney, under the circumstances shown in this case, is an absolute defense. *Simmons v. Gardner*, 46 Wash. 282, 89 Pac. 887; *Hicks v. Brantley*, 102 Ga. 264, 29 S. E. 459; *Smith v. Austin*, 49 Mich. 286, 13 N. W. 593; *Wicker v. Hotchkiss*, 62 Ill. 107, 14 Am. Rep. 75; *Huntington v. Gault*, 81 Mich. 144, 45 N. W. 970; *Johnson v. Miller*, 69 Iowa 562, 29 N. W. 743, 58 Am. Rep. 231; *Anderson v. Friend*, 71 Ill. 478; *Van Meter v. Bass*, 40 Colo. 78, 90 Pac. 637, 18 L. R. A. (N. S.) 50; *Ton v. Stetson*, 43 Wash. 471, 86 Pac. 668. The verdict acquitting the defendant Warren precludes any judgment against the appellant telephone company. *Doremus v. Root*, 23 Wash. 710, 63 Pac. 572, 54 L. R. A. 649; *Friend v. Ralston*, 35 Wash. 422, 77 Pac. 794; *Stevick v. Northern Pac. R. Co.*, 39 Wash. 501, 81 Pac. 999; *Sipes v. Puget Sound Elec. R. Co.*, 54 Wash. 47, 102 Pac. 1057; *Morris v. Northwestern Improvement Co.*, 53 Wash. 451, 102 Pac. 402. The admission in evidence of the magistrate's reasons for discharging the plaintiffs was prejudicial error. *Anderson v. Keller*, 67 Ga. 58; *Dempsey v. State*, 27 Tex. App. 269, 11 S. W. 372, 11 Am. St. 193; *Richards v. Foulke*, 3 Ohio 52; *Chapman v. Dodd*, 10 Minn. 350; *Larrence v. Lanning*, 2 Ind. 256; *Burr v. Place*, 4 Wend. (N. Y.) 591; *Thompson v. Richardson*, 96 Ala. 488, 11 South. 728.

Frank H. Kelley, for respondents.

FULLERTON, J.—On April 1, 1909, A. R. Warren, who was then president of the appellant, Inland Empire Telephone & Telegraph Company, subscribed and swore to a complaint

charging the respondents with the crime of grand larceny, the specific acts being the taking and carrying away of some two thousand feet of submarine cable of the value of two hundred dollars, the property of the company above named. The complaint was filed in a justice's court of King county, and a warrant issued against the respondents, under which they were arrested and brought before the justice's court for an examination. After a hearing they were discharged, the justice of the peace finding that there was not probable cause for believing that any crime had been committed. The respondents thereupon began the present actions against the appellant and A. R. Warren, charging them with malicious prosecution. The actions were tried together and resulted in verdicts for each of the respondents in the sum of two hundred dollars against the appellant alone, the jury finding in favor of Warren. A judgment was entered on the verdicts, and this appeal taken therefrom.

Error is assigned upon the refusal of the court to sustain the appellant's challenge to the sufficiency of the evidence to sustain the verdict. It is said there was no proof of malice on the part of either of the defendants, and for that reason the challenge should have been sustained. In so far as the defendant Warren is concerned, we have been unable to discover anything in the record that would indicate malice on his part in the instigation of the prosecution, but the jury found in his favor, and the verdict corrects any error the court may have committed in refusing to sustain the challenge made on his behalf. But with respect to the appellant, the facts are not quite the same, Mr. Warren did not become president of the appellant until long after the happening of the transaction which gave rise to the prosecution, and his knowledge of the facts thereof was almost wholly, if not entirely, hearsay. But there were other officers of the company who counseled the prosecution who did have knowledge of facts which they did not impart to the president, and which tended to put a different phase on the acts of the respondents

than were put thereon by the facts they did impart to him. Whether these officers failed to impart these facts to the president out of malice towards the respondents, and whether this malice was imputable to the appellant, we think were questions for the jury. So with regard to the contention that the facts were fully and fairly stated to the prosecuting attorney of King county and the prosecution begun on his advice. It seems clear that the president did state to the prosecuting attorney all the facts within his knowledge, but, as we say, all the facts within the knowledge of the company were not reported to him, and hence were not all stated to the prosecuting attorney. This failure was due to the fault or carelessness of other officers of the company who owed a duty to make all of the facts known. This fault could be imputed to the appellant, and warrants a finding by the jury in favor of the president while finding the company itself guilty.

It is next claimed that the verdict and judgment acquitting Warren precluded any judgment against the appellant, on the principle announced in *Doremus v. Root*, 23 Wash. 710, 63 Pac. 572, 54 L. R. A. 649. But here, again, we think the appellant has mistaken the evidence. Had the prosecution been instigated wholly by Warren, and were the appellant liable only because of the doctrine of *respondeat superior*, the analogy might be complete. But Warren did not act wholly on his own volition. The prosecution was at least sanctioned and counseled by the trustees of the company, if it was not directed by them. This evidence warranted a finding on the part of the jury against the company, although they found the president not liable.

After the discharge of the respondents by the justice of the peace, they had a transcript made of the testimony introduced at the hearing, and at the trial below the court allowed them to prove as an element of damages the amount paid for this transcript. This was error. While the respondents were entitled to show as elements of damage in the present action all necessary expenses incurred by them in making

their defense before the justice of the peace, a transcript of the proceedings made after they were discharged was not such an expense. However useful it might be to them for future reference it was in no sense necessarily incident to the proceedings, and not being so, it was not a legitimate element of damage.

While one of the respondents was on the witness stand his counsel read to him what purported to be the reasons given by the justice of the peace for refusing to hold the respondents for trial on the criminal charge, and asked him if the justice used that language. An objection was interposed by the appellant which the court overruled, after which the witness answered in the affirmative. This was also error. The evidence was not competent. As was said by the superior court of Georgia in *Anderson v. Keller*, 67 Ga. 58, passing upon a similar question:

"The question upon this trial was malice and the want of probable cause. The judgment of the magistrate discharging the plaintiff was admissible, but any reason given for that judgment should not have been admitted as evidence in this case. The plaintiff was entitled to its legal effect, but nothing more."

To the same effect are the following cases: *Dempsey v. State*, 27 Tex. App. 269; *Chapman v. Dodd*, 10 Minn. 350; *Martin v. Corscadden*, 34 Mont. 308, 86 Pac. 33; *Apgar v. Woolston*, 43 N. J. L. 57.

Counsel for respondents argues in this court that the admission of this evidence was not prejudicial even though it be erroneous, because, he says, it related to conceded facts. But appellant does not concede in this court that there was no probable cause for the arrest of the respondents, and we are unable to find in the record that such a concession was made in the court below. True, it presented evidence tending to show its nonliability, even conceding that its prosecution was not founded on probable cause, but this was not a waiver of the contention. It had the right to set up against

the respondents' cause of action as many defenses as it had, as long as they were consistent one with the other, and to offer evidence upon one was not a waiver of the others.

For the errors indicated, the judgment is reversed and a new trial awarded.

RUDKIN, MOUNT, and GOSE, JJ., concur.

[No. 8946. Department One. February 10, 1911.]

JOHN H. EVANS *et al.*, *Respondents*, v. PROSSER FALLS LAND AND POWER COMPANY, *Appellant*.[1]

WATERS—IRRIGATION—CONTRACTS—BREACH—ACT OF GOD. Where an irrigation company contracted to irrigate certain lands from the natural flow of a stream, saving responsibility for shortage by the act of God, it is not excused from performing by unusually low water during certain seasons, where it had diverted part of the natural flow to supply a town with water.

SAME—CONTRACTS—BREACH—SUPPLY—SALVAGE WATERS. Where an irrigation company is under contract to irrigate certain lands from the natural flow of a stream, waters seeping through the company's dam at the time of the contract cannot be treated as salvage waters and used for other purposes, on the construction of a new dam saving the waste waters, where the parties contracted for irrigation with reference to the natural flow of the stream.

Appeal from a judgment of the superior court for Benton county, Holcomb, J., entered March 10, 1910, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action on contract. Affirmed.

Linn & Boyle, for appellant.

Andrew Brown and *H. Dustin*, for respondents.

FULLERTON, J.—The appellant owns and operates an irrigation canal at the town of Prosser, in Benton county. The canal was constructed by a predecessor in interest of the

[1]Reported in 113 Pac. 271.

appellant, which also owned certain agricultural lands surrounding and adjacent to the canal, capable of being irrigated by water taken therefrom. These lands were sold to divers purchasers, together with a perpetual right to the use of water from the canal for the purposes of irrigation through certain named months of the year up to a definite quantity. In 1902 the respondents became the owners of certain of these lands, in part through a direct purchase from the canal company, and in part through purchase from other persons who had purchased from the canal company. The deed from the company contained a grant of a "perpetual right to the use of water from the main canal of said first party, or from a branch thereof, for the purpose of irrigating said land, between the first day of April and the last day of October, of each year, not to exceed at the rate of one cubic foot of water per second of time for each 160 acres; for the total acreage above named and amount equivalent to a constant flow of 195 cubic inches per second of time, for said irrigation period"; the tract purchased containing 18.07 acres. The deed also contained a reservation of an annual rental of one and one half dollars per acre, and certain reservations defining the mutual rights of the parties, those material to the present inquiry being the following:

"(6) That the party of the first part shall not be responsible for any deficiency of water caused by the act of God, forcible entry, hostile diversion or obstruction, or temporary damage by flood or other accident, nor by reason of damage to or breakage of machinery, but the party of the first part shall use and employ all due diligence at all times in restoring and protecting the flow of water in its canal and laterals, and in the repair of said machinery.

"(7) That the party of the first part may sell water under its canal, calling for the delivery in the aggregate equivalent to the carrying capacity of its main canal, during the irrigation season, and in case of any shortage in the canal, then each water right shall represent such part of the aggregate quantity of water in said canal, as said water right bears to

the whole number of water rights sold, and the said second party shall receive water in that proportion."

The deeds of the company to the other persons mentioned, from whom the respondents purchased, contained grants in similar language, and similar reservations and restrictions. At the time of the conveyances to the respondents, the canal was supplied with water from the Yakima river by means of pumps operated by water power. To impound the water for that purpose, the canal company had thrown a dam across the river, which seems to have served its purposes only partly. It was testified by the appellant's expert witnesses that it was not impervious to water, and that water seeped through it at a rate of from 50 to 100 cubic feet per second of time.

After the sale of the lands and water rights to the respondents, the appellant purchased and took over the water system, assuming at the same time the obligation and liabilities of the old company with reference thereto. Subsequently it put a new dam across the Yakima river, and succeeded thereby in impounding the waters that had theretofore gone to waste. It also purchased the interests of certain rival companies which had prior rights to the use of water from the river, and assumed obligations in connection with such purchases. It also took a contract to furnish the city of Prosser with water and electric lights, which necessitated installing a new water wheel, and the constant use of some one hundred cubic feet of water per second of time in its operation.

For a part of the irrigation seasons of the years 1907, 1908, and 1909, the appellant did not put enough water in the canal to supply the quantities to which the land purchasers were severally entitled, and in as far as the canal's equipment would permit it to do so, it divided the water put in *pro rata* between the several consumers. The respondents were among those who received a less quantity of water than the maximum described in their deeds of conveyance; and claiming that they had suffered a loss because thereof in the amount of the crop they were able to produce on their lands, brought the present

action to recover therefor. The action was tried by the court sitting without a jury, and resulted in a judgment in favor of the respondents in the sum of eight hundred and eighty dollars. It is from this judgment that the present appeal was taken.

The appellant, while admitting that it did not supply the maximum quantity of water to the respondents required by its contract, contends that it was excused from so doing by the fact that the water flowing in the river was not up to its normal standard during these periods; in fact that the deficiency was so great as to leave the supply inadequate for that purpose. It concedes that had it pumped into the canal the quantity needed to operate the additional wheel subsequently put in, the supply would have been adequate, but it excuses itself from turning this water into the canal by claiming it as salvage waters; that is to say, waters saved by it that were permitted by its original dam to waste at the time the contracts with the respondents and their predecessors in interest were entered into. But we think this contention is untenable. The evidence does, indeed, tend to show that the natural flow of water in the Yakima river was materially reduced during the dry seasons of the years mentioned, and were this fact the sole cause of the shortage available for the canal, we think it could be held to be so far an act of God, within the meaning of the contract, as to excuse the want of performance of the contract. But it is shown that, notwithstanding this diminution of natural flow, there would have been sufficient water had the appellant not diverted it to the operation of its additional wheel. We are clear that the appellant could not rightfully make this diversion.

If the appellant had, by turning additional streams into the river, or by some form of works, prevented loss by seepage, evaporation, or the like, and thereby increased its natural flow, it might, with some reason, claim the additional waters as salvage waters and appropriate them to an independent use. But the natural flow of waters saved by the reconstruction of its own dam are in no sense such salvage waters. The respond-

ents contracted with reference to the natural flow of the stream, not with reference to such part of it as the appellant was saving from the flow, and they have the right to insist that the entire quantity so flowing, and over which the appellant had control at the time their contracts were entered into, be turned into the canal, if so much be necessary to furnish them with the quantity for which they contracted.

The cases cited by the appellant do not maintain a contrary view. Take for example the case of *Pomona Land & Water Co. v. San Antonio Water Co.*, 152 Cal. 618, 93 Pac. 881. In that case the water allowed to be claimed as salvage and developed waters were waters saved by the defendant from seepage and evaporation by the construction of a pipe line at the point of waste, thus increasing the natural flow of the stream. So with the case of *True v. Rocky Ford Canal Reservoir & Land Co.*, 36 Colo. 43, 85 Pac. 842. There the increase of water, which it was held the defendant was not obligated to share with the plaintiff, was an increase caused by the purchase of an outstanding right not owned by the defendant when it contracted with the plaintiff. These cases do not support the rule contended for by the appellant. They are based on an increase of the natural flow of the stream, while the increase caused by the appellant was merely a saving in the natural flow which theretofore went to waste because of the imperfect appliances by which the appellant sought to save it. As we say, the respondents did not contract with reference to these appliances, but with reference to the natural flow of the water, and consequently are entitled to their proportionate share of the natural flow, no matter what means are used by the appellant to impound it.

As no other error is suggested in the brief of counsel, the judgment will stand affirmed.

PARKER, GOSE, MOUNT, and RUDKIN, JJ., concur.

[No. 8905. Department Two. February 10, 1911.]

WILLIAM FELSINGER, *Appellant*, v. MAX F. QUINN, *Respondent*.[1]

PROCESS—SUMMONS—SERVICE BY PUBLICATION—AFFIDAVIT—NECESSITY. An affidavit for the service of summons by publication is insufficient under Rem. & Bal. Code, § 228, where it fails to state that the defendant is a nonresident, or has property in this state, or the existence of any of the facts authorizing a service by publication, notwithstanding the fact may appear from the complaint; since strict compliance with the statute is jurisdictional (RUDKIN and CHADWICK, JJ., dissenting).

TAXATION—FORECLOSURE—VACATION—PROCESS—SUMMONS. A complaint to set aside a tax foreclosure, pleading *in haec verba* the only affidavit for publication of summons, alleges in substance the only attempted service, which, if insufficient, avoids the judgment.

Appeal from a judgment of the superior court for Spokane county, Hinkle, J., entered March 2, 1910, upon sustaining a demurrer to the complaint, dismissing an action to quiet title. Reversed.

Cannon & Lee, *George M. Ferris*, and *Charles E. Swan*, for appellant, cited: 32 Cyc. 467, and note 25; *McManus v. Morgan*, 38 Wash. 528, 80 Pac. 786; *Rust v. Kennedy*, 52 Wash. 472, 100 Pac. 998; *Gilmore v. Lampman*, 86 Minn. 493, 90 N. W. 1113, 91 Am. St. 373; *Tilton v. O'Shea*, 31 Wash. 513, 72 Pac. 106; *Paxton v. Daniell*, 1 Wash. 19, 23 Pac. 441; *Rust v. Kennedy*, 52 Wash. 472, 100 Pac. 998; *Cordray v. Cordray*, 19 Okl. 36, 91 Pac. 781; *Shields v. Miller*, 9 Kan. 390; *Romig v. Gillett*, 10 Okl. 186, 62 Pac. 805; *Manning v. Heady*, 64 Wis. 630, 25 N. W. 1; *Feikert v. Wilson*, 38 Minn. 341, 37 N. W. 585; *McGavock v. Pollack*, 18 Neb. 535, 14 N. W. 659.

P. F. Quinn, for respondent, cited: *McManus v. Morgan*, 38 Wash. 528, 80 Pac. 786; *Tilton v. O'Shea*, 31 Wash. 513, 72 Pac. 106; *Whitney v. Knowlton*, 33 Wash. 319, 74

[1]Reported in 113 Pac. 275.

Pac. 469; *Rust v. Kennedy*, 52 Wash. 472, 100 Pac. 998; *Moynahan v. Superior Court*, 42 Wash. 172, 84 Pac. 655; *Decorvet v. Dolan*, 7 Wash. 365, 35 Pac. 72; *Goore v. Goore*, 24 Wash. 139, 63 Pac. 1092; *Ervin v. Milne*, 17 Mont. 494, 43 Pac. 706; *Calvert v. Calvert*, 15 Colo. 390, 24 Pac. 1043; *Johnson v. Hunter*, 147 Fed. 133; *Timmerman v. McCullagh*, 55 Wash. 204, 104 Pac. 212; *Merz v. Mehner*, 57 Wash. 324, 106 Pac. 1118.

Crow, J.—Action by William Felsinger against Max F. Quinn to quiet title. The defendant interposed a demurrer to the complaint, which was sustained. The plaintiff thereupon refused to plead further, and has appealed from an order of dismissal.

The complaint, in substance, alleged, that the appellant is the owner of certain lots in the city of Spokane, on which taxes for the years 1904, 1905, 1906, and 1907, were not paid; that a certificate of delinquency was issued to the respondent, who thereafter instituted an action in the superior court of Spokane county to foreclose the same, and attempted to obtain service by publication upon William Felsinger, the defendant therein, now appellant herein; that the publication was based upon the following affidavit filed in the foreclosure action:

"(Title of Court and Cause.)

"State of Washington, } ss.
"County of Spokane, }

"P. F. Quinn being first duly sworn on oath says: That he is the attorney and has been the attorney for plaintiff in the above entitled action; that he has made diligent inquiry as to the residence of defendant and has been unable to ascertain his present address; that the plaintiff has a good cause of action against defendant, which is set forth in the complaint and that it would be useless and inexpedient to attempt personal service as he believes defendant is a nonresident of the state of Washington, and further affiant sayeth not.

"P. F. Quinn.

"Subscribed and sworn to before me this 12th day of June, 1908.

"C. F. Eaton,

"Dep. Clerk for Washington, residing at Spokane, Wash.;"

that the affidavit was insufficient; that the court never acquired jurisdiction of the defendant, and that the judgment rendered upon such attempted service, the sale thereunder, and the tax deed issued by the county treasurer, were void. Tender of the delinquent taxes, interest, and costs to the treasurer of Spokane county was alleged, it being further alleged that Max F. Quinn was absent from the state of Washington, and that tender could not be made to him.

The only question presented to this court is the sufficiency of the complaint. It seems to be conceded in the briefs of both parties that, if the affidavit above set forth was not sufficient, the complaint stated a cause of action, but that if it was sufficient the demurrer was properly sustained. It will be noticed that the affidavit failed to state the existence of any one of the causes specified in subdivisions 1 to 7, inclusive, of § 228, Rem. & Bal. Code. This section is applicable to tax foreclosure proceedings commenced by a private party. *Williams v. Pittock*, 35 Wash. 271, 77 Pac. 385. There being no allegation in the affidavit that the defendant had property within this state, or that the court had jurisdiction over the subject-matter of the action, the appellant contends it did not justify publication of summons, and that no jurisdiction was obtained. Section 228, *supra*, expressly requires a statement in the affidavit of the existence of at least one of the cases in the section mentioned. Subdivision 6 applies to the foreclosure of a tax lien, and the affidavit therefore should have stated, not only that the defendant was a nonresident of the state of Washington, but also that he had property therein, and that the court had jurisdiction of the subject-matter of the action. An attempted affidavit for service by publication which entirely omits allegations expressly required by the statute is without vitality or force, and when filed leaves the party, on whose behalf it is made, in no better position than if no affidavit had been filed. In *McManus v. Morgan*, 38 Wash. 528, 80 Pac. 786, a similar action, our holding was substantially to this effect. Where jurisdiction of a defendant depends

upon service by publication, the making of the affidavit for publication, in strict compliance with the statute, is as essential to obtaining such jurisdiction as the publication of the summons itself, and an affidavit which does not contain all the statements specifically required by the statute is not sufficient to authorize publication of summons or confer jurisdiction. In *Gilmore v. Lampman*, 86 Minn. 493, 90 N. W. 1113, 91 Am. St. 373, the supreme court of Minnesota, commenting upon a section of the code of that state, substantially the same as § 228, *supra*, observed:

"In this case the affidavits themselves were wholly deficient because they did not state that respondent had property in the state of Minnesota. The affidavit itself is the prerequisite upon which jurisdiction is based, and it must contain and state positively all of the facts required by the statute. When a proceeding is commenced to obtain service by publication, the defendant has the right to examine the affidavit on file, and to govern his conduct accordingly. It is immaterial that the complaint contains the information wanting in the affidavit, for the interested party is not required to examine the complaint to ascertain the facts. Whatever may have been the holdings in some jurisdictions, we know of no case where, under a similar statute, it has been held that the affidavit may be aided by reference to other papers of record. It has become the well recognized and settled rule in this state that the affidavit must be complete in itself as to all material matters, and we hold that the affidavits in question are insufficient, and did not confer jurisdiction."

The complaint in this action pleads *in haec verba* the only affidavit filed in the tax foreclosure proceedings, and in substance alleged that the only attempted service was one by publication based thereon. The tax foreclosure was not prosecuted by the county but by a private individual. The affidavit was not sufficient. The complaint therefore stated a cause of action.

Reversed and remanded with instructions to overrule the demurrer.

Dunbar, C. J., and Morris, J., concur.

RUDKIN, J. (dissenting)—I dissent. Section 228, Rem. & Bal. Code, provides that,

"When the defendant cannot be found within the state (of which the return of the sheriff of the county in which the action is brought, that the defendant cannot be found in the county, is *prima facie* evidence), and upon the filing of an affidavit of the plaintiff, his agent or attorney, with the clerk of the court, stating that he believes that the defendant is not a resident of the state, or cannot be found therein, and that he has deposited a copy of the summons and complaint in the postoffice, directed to the defendant at his place of residence, unless it is stated in the affidavit that such residence is not known to the affiant, and stating the existence of one of the cases hereinafter specified, the service may be made by publication of the summons, by the plaintiff or his attorney in either of the following cases: . . . .

"6. When the action is to foreclose, satisfy, or redeem from a mortgage, or to enforce a lien of any kind on real estate in the county where the action is brought, or satisfy or redeem from the same; . . . ."

The specific objection urged against the affidavit under consideration, is its failure to allege that the tax foreclosure proceeding was an action to foreclose a lien against real property situate in the county where the action was brought—a fact that of necessity appeared on the face of the verified complaint in that action. I am willing to concede that statutes authorizing the service of summons by publication must be strictly construed, but it seems to me the purpose of the affidavit is fully satisfied when the jurisdictional facts appear elsewhere in the record. Many of the matters set forth in the seven subdivisions of § 228, *supra*, do not ordinarily appear on the face of the record, and as to these the statute is mandatory, but I cannot yield my assent to the proposition that the mere failure of the affidavit to state that the action is one to foreclose a lien on real property, when such fact of necessity already appears of record, is fatal to the jurisdiction of the court; for the jurisdiction depends upon the character of the action as disclosed by the entire record, and not upon the simple averments of the affidavit.

It has frequently been held that informal or defective affidavits for attachments, or for service by publication, are aided and supplemented by verified complaints, and it seems to me that this rule is a sound one, especially as to mere formal matters, such as the nature of the action of which the complaint itself is the best and primary evidence. 1 Wade on Attachment, § 63; 4 Cyc. 470; 17 Ency. Plead. & Prac. 76. In *Stiles v. James*, 2 Wash. Ter. 194, 2 Pac. 188, it was held that failure of the complaint to allege that the property or some part thereof was, at the time of the commencement of the action, in the county in which the action was brought, was aided by the sheriff's return showing that fact. In *Coleman v. Cravens*, 41 Wash. 1, 82 Pac. 1005, it was contended that notice of an application for the appointment of a guardian was insufficient for the reason that no affidavit of nonresidence was filed, but in answer to this contention the court said:

"The statute provides that, upon the presentation of a petition, the court shall cause notice to be served on the insane person and on the person having the care, custody, and control of such insane person. Laws 1903, p. 242, § 1. The verified petition should set forth the residence of the insane person so that the court may cause the proper notice to be given. That was done in this case, the petition was duly verified, and the necessity for filing a second affidavit setting forth the same facts is not apparent."

True, in that case the statute did not require an affidavit of nonresidence, but it did require that the fact of nonresidence should appear, and while the nature of the action should appear of record, why it should appear more than once, or why a failure to have it so appear should defeat the jurisdiction of the court, I confess I do not know.

The judgment of the court below should be affirmed.

CHADWICK, J., concurs with RUDKIN, J.

[No. 8752. Department One. February 10, 1911.]

OLAUS PETERSON *et al.*, *Respondents*, v. PANTHEON LUMBER COMPANY, *Appellant*.[1]

PLEADING—COMPLAINT—SEPARATE STATEMENT OF CAUSES — OBJECTION HOW TAKEN. Objection to a complaint for not separately stating the several causes of action cannot be taken by demurrer, but only by motion.

CORPORATIONS—ACTIONS—PARTIES—JURISDICTION— PRESUMPTION—PLEADING—COMPLAINT. Rem. & Bal. Code, § 4854 providing that a corporation may be sued in a county wherein it has an office for the transaction of business, or an agent upon whom service may be made, does not require the fact to be affirmatively alleged, nor make a complaint demurrable for want of jurisdiction, where the fact does not appear on its face, since jurisdiction will in such case be presumed.

PLEADING—DEMURRER—SEVERAL CAUSES. A general demurrer to several causes of action on the ground that the statute of limitations has run must be overruled if any one of the causes is not barred by the statute.

LIMITATION OF ACTIONS—RENTS—LANDLORD AND TENANT. An action for rent is within Rem. & Bal. Code, § 157, subd. 3, providing a limitation of six years for rents and profits for the use and occupation of real estate.

Appeal from a judgment of the superior court for Stevens county, Carey, J., entered January 2, 1908, upon findings in favor of the plaintiffs, after a trial before the court without a jury, in an action on account. Affirmed.

Slater & Allen, for appellant.

Jesseph & Grinstead, for respondents.

PARKER, J.—This appeal involves only the alleged error of the superior court in overruling the demurrer to the complaint. The facts relied upon by the plaintiffs are set forth separately in the body of their complaint as three causes of action. The first is for rent alleged to be due upon certain real property

[1]Reported in 113 Pac. 562.

leased by the plaintiffs to the defendant; the second is for money alleged to be due as the purchase price of saw logs sold by the plaintiffs to the defendant; and the third is for money alleged to be due on account of meat furnished and services rendered by the plaintiffs to the defendant at its instance and request. Attached to the complaint and made part thereof is a statement of the items sued upon, in chronological order. The defendant demurred to the complaint upon the grounds:

"(1) That several causes of action have been improperly united. . . .

"(3) That the court has not jurisdiction of the person of the defendant or of the subject-matter of the action.

"(4) That the action has not been commenced within the time limited by law."

Other grounds of demurrer are not here involved. The superior court overruled the demurrer, when the defendant elected to stand thereon and declined to plead further. Thereupon the court heard evidence in support of the allegations of the plaintiffs' complaint, made findings of fact and conclusions of law in their favor, and rendered judgment against the defendant accordingly. The defendant has appealed.

Referring to the first ground of demurrer, learned counsel for appellant do not seem to contend that the several causes could not be joined in one action, but contend, in substance, that the reference in each cause of action stated in the body of the complaint to the attached statement, which is itemized in chronological order without the items being separately stated or grouped as to each cause of action, is not a separate statement of each cause of action. We think a reference to this account will render it easy to determine therefrom to which cause of action each of the items upon which recovery is sought belongs; but even if this were not true, and there were no separate statement whatever of the separate cause of action, the complaint would not be demurrable upon that ac-

count. In the case of *Richardson v. Carbon Hill Coal Co.*, 10 Wash. 648, 651, 39 Pac. 95, this court said:

"Where a complaint sets forth two causes of action, which may properly be joined, without separately stating them as required by the code, the proper remedy is a motion to require plaintiff to make his complaint more definite and certain by stating separately his several causes of action. Pomeroy, Code Remedies, § 447; Boone, Code Plead. § 266."

See, also, 6 Ency. Plead. & Prac., 341.

It is next contended that the complaint is demurrable upon the ground that it fails to state facts affirmatively showing jurisdiction under Ballinger's Code, § 4854, which was in force at the time of the commencement of this action, and provided:

"An action against a corporation may be brought in any county where the corporation has an office for the transaction of business, or any person resides upon whom process may be served against such corporation, unless otherwise provided in this code."

The complaint alleges:

"That the defendant now is and at all times herein mentioned, was a corporation, organized and existing under and by virtue of the laws of the state of Washington, and engaged in the manufacture of lumber."

There is no other allegation in the complaint showing that the appellant corporation has an office for the transaction of business in Stevens county, or that any person resides in Stevens county upon whom process may be served against such corporation. The holding of this court in *McMaster v. Advance Thresher Co.*, 10 Wash. 147, 38 Pac. 670, is relied upon in support of this contention. *Hammel v. Fidelity Mutual Aid Ass'n*, 42 Wash. 448, 85 Pac. 35, is to the same effect though not cited by counsel. In those cases the jurisdictional question was raised by petition and motion, putting directly in issue the facts upon which jurisdiction depended under Ballinger's Code, § 4854, and the question of the sufficiency of a complaint which omitted to affirmatively show

such facts was in no way involved. The supreme court of Indiana, dealing directly with the question here involved, in the case of *Rudisell v. Jennings*, 38 Ind. App. 403, 77 N. E. 959, 78 N. E. 263, said:

"A circuit court is a court of general jurisdiction, and it is only when the want of jurisdiction appears on the face of the complaint that a demurrer will lie. In actions in such a court it is not necessary that the complaint should affirmatively show that the court has jurisdiction. If there is nothing in the complaint to show whether the court has or has not jurisdiction, the question cannot be raised by demurrer, as the jurisdiction will be presumed."

See, also, *Currie Fertilizer Co. v. Kirsh*, 24 Ky. Law 2471, 74 S. W. 268; *Powers v. Ames*, 9 Minn. 178.

We are of the opinion that the want of jurisdiction does not appear upon the face of this complaint. Therefore that question cannot be raised by demurrer.

Finally, it is contended that it appears upon the face of the complaint that the action has not been commenced within the time limited by law. This ground of demurrer is directed to the whole complaint, and not to any particular cause of action, as were also all the other grounds of demurrer. The first cause of action was for rent due under a lease of real estate. This rent covered a period of four years preceding the commencement of the action. It seems clear, under Rem. & Bal. Code, § 157, that a claim of this nature is not barred until six years after its accrual. Subdivision 3 of that section provides that the six-year limitation is applicable to "An action for the rents and profits or for the use and occupation of real estate." An examination of the other causes of action we think will also show that they are not barred, though we regard that as of no consequence in this inquiry, since the demurrer upon this ground is not directed to any particular cause of action. It is therefore only necessary for us to inquire as to whether or not any cause of action stated in the complaint is good as against such demurrer. *Meals v. De Soto Placer Min. Co.*, 33 Wash. 302, 74 Pac. 470; *Hindle v.*

Holcomb, 34 Wash. 336, 75 Pac. 873; 6 Ency. Plead. & Prac., 305.

We conclude that there was no error committed by the learned trial court in overruling the demurrer; and since appellant stood thereon and declined to plead further, the court was authorized to proceed to judgment.

The judgment is affirmed.

RUDKIN, MOUNT, GOSE, and FULLERTON, JJ., concur.

[No. 9168. Department One. February 10, 1911.]

THE STATE OF WASHINGTON, *on the Relation of the Northern Pacific Railway Company, Respondent*, v. RAILROAD COMMISSION OF WASHINGTON, *Appellant*.[1]

RAILROADS—RATES—REGULATION—REASONABLENESS — TRAIN SERVICE. An order of the railroad commission requiring a daily mixed freight and passenger service over a branch line fourteen miles long is unreasonable, where the income from passenger travel resulting therefrom was only 9 cents per mile, and cost over thirty cents per mile, the present bi-weekly freight service was adequate and a financial loss to the company, which loss would be increased by the change without any great necessity for it.

Appeal from a judgment of the superior court for Chehalis county, Sheeks, J., entered January 26, 1910, upon findings in favor of the plaintiff, vacating on certiorari an order of the railroad commission requiring the furnishing of extra train service, after a hearing before the court. Affirmed.

The Attorney General, and *W. V. Tanner* and *R. E. Campbell, Assistants*, for appellant.

Geo. T. Reid, for respondent.

PARKER, J.—Upon a hearing had in October, 1909, the railroad commission entered an order requiring the Northern

[1]Reported in 113 Pac. 252.

Pacific Railway Company to operate a mixed freight and passenger train each way, between its stations of South Aberdeen and Ocosta, each day of the week except Sunday. The railway company, considering itself aggrieved by the order, caused the proceedings to be removed by writ of review to the superior court for Chehalis county. A hearing in that court, upon the evidence taken before the commission, resulted in findings and judgment declaring the order of the commission to be unreasonable, and vacating the same. From this judgment, the commission has appealed to this court.

The evidence upon which the commission's order was based is practically free from conflict, though it is not very satisfactory. However, we believe that the following is a fair statement of the controlling facts established, and is as favorable to the commission's contention as the record will warrant. The railway company owns and operates a branch line of railway from South Aberdeen to Ocosta, in Chehalis county, a distance of about fourteen miles. The railway company now maintains a train service on this branch consisting of one mixed train each way twice a week. During November and December, 1907, and January and February, 1908, the railway company maintained a daily train service on this line, and during that period the passenger travel on the line only produced an income of nine cents per mile per day in one direction, and eleven cents per mile per day in the opposite direction. That is, there was an average of between three and four passengers per day carried over the line in each direction at the usual fare of three cents per mile. There is no evidence in the record to warrant the conclusion that the passenger earnings would be greater than this at the present time with a daily train service. The cost of operating a train over the line is not less than thirty cents per mile, not including maintenance expenses. The two trains per week now operated are entirely sufficient to render all necessary freight service to the people along the line. The entire receipts from freight and passengers, even as the train service is now operated, is

not sufficient to prevent the line being operated at a financial loss to the railway company, and it is evident that that loss would be materially increased by the additional expense incident to a daily train service. The benefits to the public of a daily freight service over the present service would be insignificant. And while the additional passenger service would no doubt be of some convenience to the public, we do not think the necessities of the public for such service is of enough consequence to warrant the forcing of the railway company to furnish such additional service at a financial loss in addition to the loss now being incurred by it in operating the line as at present. This branch line and the small community it serves are both relics of the memorable real estate boom of the early nineties. Nearly all of the business inducements which prompted the building of this branch line have vanished, and we believe the evidence in this record shows that the railway company is bearing all of the burdens required of it in furnishing to the public the present train service.

We are of the opinion that the learned superior court correctly determined that the order of the commission is unreasonable. The judgment is affirmed.

RUDKIN, MOUNT, FULLERTON, and GOSE, JJ., concur.

[No. 8237. *En Banc.* February 11, 1911.]

LOUIS GROSJEAN, *Respondent*, v. DENNY-RENTON CLAY & COAL COMPANY, *Appellant*.[1]

MASTER AND SERVANT — FELLOW SERVANTS — GIVING OF SIGNALS. The feeder of a brick machine, whose duty it was to signal the pressman for starting the press, is not a fellow servant of a coemployee whose safety depended upon the giving of the proper signals, and the same is a nondelegable duty of the master.

SAME—SAFE PLACE—NEGLIGENCE—ERRONEOUS SIGNALS—CONTRIBUTORY NEGLIGENCE—QUESTIONS FOR JURY. The negligence of the owner of a brick machine, and the contributory negligence of an employee whose duty it was to remove dry clay from the top of the press, while coemployees controlled the machinery, is for the jury, where it appears that the employee was ordered and it was customary for him to put his hands in the press relying upon notice to the feeder, that the pressman never started the press until signaled to do so by the feeder except on starting up in the morning, that the pressman started the press in response to a wrong signal given by the feeder while the employee's hands were in the press, cutting off his hands, and that a stick to be first inserted in the press in such a case for safety was not used, and that the employee had worked but a few months and did not know anything about such stick.

Appeal from a judgment of the superior court for King county, Albertson, J., entered April 8, 1909, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by an employee in a tile plant. Affirmed.

Kerr & McCord and *Roberts, Battle, Hulbert & Tennant*, for appellant.

Clay Allen and *Walter M. French* (*Winter S. Martin*, of counsel), for respondent.

PARKER, J.—The plaintiff seeks to recover damages for personal injuries, which he contends resulted to him from the negligence of the defendant while he was working as a clay mixer in its tile pipe manufacturing plant. The de-

[1]Reported in 113 Pac. 570.

fendant denied the acts of negligence charged against it, and affirmatively pleaded assumption of risk and contributory negligence on the part of the plaintiff and his fellow servant. A trial resulted in a verdict and judgment against the defendant, from which it has appealed.

It was the respondent's duty, among others, to attend a machine situated upon the ground floor, which mixed the clay to the consistency of putty, and then place it upon a conveyor by which it was carried up to the third floor convenient to the press. This conveyor dropped the clay upon a horizontal storage conveyor about eight feet long, which led to the press. This storage conveyor was operated by another employee who was known as the feeder. A short stairway of five steps led from the third floor to the station of the feeder, close to the horizontal conveyor, where he sat facing the press. His duties required him to fill the press from the horizontal conveyor, starting and stopping it as became necessary. When the press was full of clay, the feeder stopped the horizontal conveyor until the clay was exhausted in the press, and the head would then be raised and the press again filled. The press consists of two cylinders, one above the other, the upper one being for steam and the lower one for clay. The piston of the steam cylinder has attached to its lower end a head which fits snugly into the clay cylinder and is forced by the steam down upon the clay, pressing the clay into moulds or dies, under the clay cylinder. The clay cylinder is twenty inches in diameter, and when the head is raised to its highest position there is a space of about twelve inches from the top of the clay cylinder to the head. This enables the clay to be fed into the top of the cylinder from the horizontal conveyor. The clay cylinder extends from a little above the third floor down through that floor into the second story, where the dies are. The press is operated by an employee called the pressman, who is also foreman of the press gang, whose position is near the dies on the second floor. He stands with his hand on the

throttle lever and applies the necessary pressure upon the clay in the cylinder.

It was respondent's duty to take care that no dry clay be carried up, pass into the press, and the head come down upon it, as it would cause trouble and delay, and render the plant idle for a time while such dry clay was being removed. If any dry clay happened to go up on the conveyor it was respondent's duty to follow it up and, if possible, remove it before it passed into the press and the head came down on it. Soon after starting the plant on the morning respondent was injured, he noticed some dry clay start up the conveyor. He immediately ran up stairs for the purpose of intercepting it if possible. He first went to the horizontal conveyor from which the press is fed, and examined the clay there, and not finding the dry clay there, went to the press, the head being up and not in operation, put his hands in the top of the clay cylinder for the purpose of examining the clay there and removing the dry clay if found there, when the the pressman on the second floor turned the steam on, bringing the head down into the clay cylinder, severing both of respondent's hands. These facts are practically undisputed, and will serve to render readily understood the facts bearing directly upon the questions of negligence involved.

It is contended by learned counsel for appellant that the issue upon appellant's negligence involves only the question of the feeder negligently giving to the pressman the wrong signal when respondent had his hands in the press, thereby causing the pressman to start the press. In their brief they state their view of this issue as follows:

"It is alleged that Forey, the feeder, negligently gave to the pressman a signal to start the press while he had his hands in it, and that the pressman did put the press in operation to his injury as alleged. So that the sole question of negligence presented upon this appeal is the allegation that the feeder, Forey, negligently gave a wrong signal to the pressman at a time when the plaintiff was in a position of danger."

We will adopt this theory, though learned counsel for respondent seem to regard the issue as somewhat broader. It is also contended in behalf of appellant that, in any event, the negligence of the feeder in this regard was that of a fellow servant of respondent; while it is contended on behalf of respondent that in giving the signals the feeder was performing a duty which appellant could not delegate and thereby escape the consequence of its negligent performance. These questions are all involved in appellant's general contention that the evidence does not sustain the verdict and judgment. We will now notice the facts bearing directly thereon. The evidence touching these facts was by no means free from conflict, but it tended to show the following:

The feeder and the pressman were stationed on different floors as we have seen, and not within view of each other; neither could the pressman see the feeding conveyor or the press so as to know when to operate or desist from operating it. This rendered it necessary to have a system of signals by which the feeder could communicate to the pressman, since the press must be operated according to the conditions that existed in and about it, and the feeder was the only man at all times conversant with those conditions. For the purpose of so signaling, the feeder had near his station a piece of metal upon which he would strike with a small steel rod so it could be heard by the pressman, almost under him on the second floor. One stroke by the feeder meant for the pressman to operate the press; that is, to bring the head down upon the clay and was always given when the cylinder was full of clay ready to press it into the dies under the cylinder. Two strokes by the feeder meant to raise the head and hold it. Two strokes would also mean to hold the head if it was already up to its highest position, but it was not necessary to give any signal to hold the head if it was already up. The pressman never brought the head down unless signaled so to do by the feeder, except possibly in the morning immediately upon starting of the machinery, before any fresh clay passed

into the cylinder; the purpose being to work out the water accumulated upon the clay left in the press over night, and then the pressman would first rattle a loose rod, which meant to the feeder, or any one near the press, that the press was about to start. Then after working the head up and down a few times it would be raised, leaving the cylinder open for feeding at the top, and the pressman would wait for a signal, one bell, informing him that the cylinder was full of clay and ready to go ahead. It is conceded that the head when up would not come down save by the act of the pressman applying the steam, and that he did apply the steam at the time of respondent's injury. It was very necessary that no dry clay go up into the press. This fact had many times been impressed upon respondent, not only by directions of the foreman, but also by his knowledge of its effect upon the work of the plant. He had been scolded several times by the foreman for letting dry clay go into the press and the head come down before taking it out. He testified to instructions having been given him by the foreman, as follows:

"He told me whenever I saw some dry clay, to follow it up and pick it up, he says, 'Go on, go on, take that clay out wherever you find it; I don't want to take that die off all the time, we lose too much time.' "

This is the substance of instructions given him on several occasions. The pressman, who was also foreman as to this work, had given these instructions. It was a custom of respondent to follow up dry clay which accidentally got on the conveyor, and take it out, not only from the horizontal storage conveyor run by the feeder, but also to take it out of the top of the clay cylinder with his hands before the head came down. Appellant knew of and sanctioned this custom, and the feeder and pressman also knew of it. When respondent followed up the dry clay at the time of his injury he passed close to the pressman, who was facing towards respondent and evidently saw him pass. He went immediately to the horizontal conveyor at the side of and close to the feeder,

saying to the feeder, "Jim there is some dry clay come up," who replied, saying, "I don't know, I didn't see any." He then examined with his hand the clay in the horizontal conveyor, and not finding the dry clay there, he said to the feeder, "The dry clay went into the press already; hold the press and don't let her go, I am going to pick out that piece of dry clay." The head of the press was then up and stationary, in its usual position while the press was being filled with clay. Some clay had passed into the press which had come up on the conveyor that morning, evidently being about the first clay coming up. This is to be kept in mind, for it is a fact very close to the cause of the starting of the press. Let us continue the story of respondent's acts and what he heard in his own language, given in answer to questions as follows:

"Q. Was the press in operation at that time? A. No, sir. Q. Then what did you do, Louis? A. Then I went down the steps, I took the torch and I went on my knee in front of the press— . . . I went on my knee in front of the press, and I had a torch in my right hand, and with my left hand I went in, in the press, to pick out that piece of dry clay. . . . And while I was down there looking in that clay for that piece of dry clay, I heard a bell and I— . . . I heard one bell. Q. And what does that mean? A. Means to go ahead. Q. What did you do next, Louis?. A. I tried to jerk back. I had this arm at the shoulder in the press and this one just about half way to the elbow and the hand, and I started to pull back, but before I had time to pull them clear out the head went down and cut them off."

There was no signal from the pressman by shaking the rod prior to the press starting. There was testimony introduced in behalf of appellant tending to show that a stick of wood, of sufficient size, was lying by the press to be put under the head on top of the clay cylinder for safety, when it was necessary to put one's hand in the cylinder, but respondent says he did not know of any such stick. The testimony of the pressman was to the effect that he did not start the press in response to a signal from the feeder, but that he was

then starting it for the first time in the morning for the usual purpose of working the water out of the clay left in the press over night. This, we think, is negatived by the evidence tending to show that that operation was performed before any fresh clay went into the press; that the feeding of fresh clay into the press had commenced, and the head was being held up for feeding; and that the pressman was awaiting a signal from the feeder to put the press in operation. The respondent and the pressman then employed had been employed at their respective stations for several years, and the feeder had been employed for several months. All of them were familiar with the conditions surrounding the operation of that part of the plant.

A careful review of the evidence convinces us that it was sufficient to warrant the jury in believing, that the taking of the clay out of the press by respondent with his hands was sanctioned by the appellant by custom and general instructions, if not by specific instructions; that the press was started by the pressman in response to a wrong signal given by the feeder while respondent's hands were in the press; that it was the duty of the feeder, as signalman, to signal, or withhold signaling, to the pressman, thus controlling the starting of the press, whether such control was required on account of clay being in the press ready for use, or on account of no clay being therein, or on account of respondent being there to remove dry clay, or for any reason there plainly calling for so controlling the press. The jury having evidently resolved the facts in favor of respondent upon these questions, we are of the opinion that the feeder was not a fellow servant of the plaintiff for the purpose of signaling to, or withholding signals from, the pressman, but that the feeder's negligence in performing that duty was the negligence of appellant. The following decisions of this court support this view: *Westerlund v. Rothschild*, 58 Wash. 626, 102 Pac. 765; *Mercereau v. Maughlin Mill Co.*, 58 Wash. 475, 102 Pac. 232; *Johnson v. Motor Shingle Co.*, 50

Wash. 154, 96 Pac. 962; *Maloney v. Stetson & Post Mill Co.*, 46 Wash. 645, 90 Pac. 1046; *Comrade v. Atlas Lumber & Shingle Co.*, 44 Wash. 470, 87 Pac. 517; *Westby v. Washington Brick, Lime & Mfg. Co.*, 40 Wash. 289, 82 Pac. 271; *Sroufe v. Moran Bros.*, 28 Wash. 381, 68 Pac. 896, 92 Am. St. 847, 58 L. R. A. 313. We conclude that the questions of appellant's negligence, and also of respondent's contributory negligence, could not be determined as a matter of law, and that they were properly submitted to the jury.

Some assignments of errors were made upon the instructions given, and requested instructions refused. These are discussed but slightly in appellant's brief, and we do not feel called upon to review them in detail here. We regard them all without merit. The learned trial court gave full and fair instructions to the jury, confining the issues within the narrow limits we have indicated by our discussion, as he also did in the conduct of the trial. We find no prejudicial error in the record. The judgment is affirmed.

DUNBAR, C. J., CROW, GOSE, and RUDKIN, JJ., concur.

FULLERTON, J., concurs in the result.

[No. 9299. Department One. February 11, 1911.]

CATHERINE McSORLEY, *Respondent*, v. G. W. LINDSAY, *Appellant*.[1]

MORTGAGES—REDEMPTION—RIGHT TO REDEEM—TENANTS IN COMMON—PRIORITY. Tenants in common, who joined in a mortgage, are equally entitled to redeem from the foreclosure sale, and redemption by one inures to the benefit of the other, subject to reimbursement, and their priority in demanding redemption from the sheriff is immaterial; hence neither can maintain an action to restrain the issuance of a certificate to the other.

APPEAL — DECISIONS REVIEWABLE — DISMISSAL — MOOT QUESTIONS. Where a court has erroneously found that one tenant in common has priority in the right to redeem from a mortgage foreclosure

[1]Reported in 113 Pac. 267.

sale, and can maintain an action against the other to enforce the same, an appeal therefrom will not be dismissed for want of any controversy, on the theory that redemption by either inures to the benefit of the other; since the argument goes to the merits of the case.

DUNBAR, C. J., dissents.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered June 15, 1910, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to redeem real property from a mortgage foreclosure sale. Reversed.

Charles H. Gray and *Geo. McKay*, for appellant.

Faben & Kelleran, for respondent.

MOUNT, J.—The respondent brought this action to require the sheriff of King county to permit her to redeem certain real estate sold on mortgage foreclosure, and also to restrain the sheriff from issuing to appellant a certificate of redemption of the same property. Upon a trial of the case, a decree was entered in favor of the plaintiff. The defendant, G. W. Lindsay, has appealed from that decree.

The facts are as follows: The appellant, G. W. Lindsay, and E. M. McSorley, husband of the respondent, acquired the property in dispute as tenants in common. After they acquired the property, they joined in a mortgage thereon. This mortgage was thereafter regularly foreclosed, and the property was sold to satisfy the mortgage. At the sale the property was bid in by V. H. Faben, at the request of Mr. McSorley. Afterwards, in order to secure Mr. Faben, Mr. and Mrs. McSorley executed to him a quitclaim deed of their equity in the property. Thereafter Mr. Faben assigned his certificate of sale to one Markham, who held the same until the time of redemption. In the meantime Mr. McSorley conveyed all his interest in the property to his wife. The date fixed for redemption of the property from the sale was November 8, 1909. On November 2, 1909, the

appellant served on the sheriff a notice of intention to redeem the property. On November 8, 1909, Faben, acting for the respondent, delivered to the sheriff money sufficient to redeem the property, but the sheriff did not issue a certificate of redemption to Mr. Faben for the reason, stated at the time, that Mr. Lindsay, the appellant, had served notice of intention to redeem on that date. Later in the day Mr. Faben withdrew the deposit and attempted to redeem from Mr. Markham. Subsequently, on the same day, the appellant deposited with the sheriff sufficient money to redeem the property. Thereupon this action was begun. The question tried was the priority of right of the appellant and respondent to redeem the property.

It is apparent that both parties were vested with the right to redeem under the statute, and it is also apparent that their rights were equal, and that the redemption by one of the parties would inure to the benefit of the other subject to reimbursement by the other. *Stone v. Marshall*, 52 Wash. 375, 100 Pac. 858. The question presented was, therefore, of no importance to either of the parties. The trial court, at the conclusion of the evidence, found that, "The sheriff should have permitted Mrs. McSorley at the time she applied there to redeem the property, she being prior to the defendant. I will find in her favor upon her paying the money necessary to effect the redemption. Any other rights of the parties in this case must be disposed of in some other manner. They cannot be determined in this case under the pleadings." It is apparently conceded that the appellant had served the notice required by the statute, Rem. & Bal. Code, § 599, and subsequently paid the money necessary to effect the redemption. It was therefore clearly the duty of the sheriff to issue his certificate to that effect. It is true that the respondent also paid the sheriff money sufficient to effect the redemption before the appellant paid his money, but before any certificate was issued respondent withdrew her money and sought redemption from the person holding the certificate

of sale. It is difficult to understand, under such circumstances, how the respondent had a cause of action, either against the sheriff or the appellant, to compel the issuance of the certificate of redemption to her; for, as we have seen above, the certificate issued to either of the parties inured to the benefit of the other. It is plain, therefore, that the trial court should have dismissed the action.

Respondent moves to dismiss this appeal on the ground that there is no controversy between the parties. The same controversy exists now that existed at the trial. This argument really goes to the merits of the case. To dismiss the appeal would, in effect, sustain the trial court in concluding that a cause of action existed when in law there was none.

The motion is denied, and the judgment is reversed, and the cause ordered dismissed at respondent's costs.

PARKER, FULLERTON, and GOSE, JJ., concur.

DUNBAR, C. J., dissents.

[No. 9277. Department Two. February 14, 1911.]

W. M. BLAKELY *et al.*, *Appellants*, v. S. H. SUMNER *et al.*, *Respondents*.[1]

VENDOR AND PURCHASER—RIGHTS OF VENDEE—WAIVER. The vendee waives rights under a contract to purchase land, where, on being notified that vendors could not obtain and convey the whole title, he proposed to purchase the vendors' interest at a price to be agreed upon and himself negotiate for the balance of the title.

FRAUDS, STATUTE OF—SALE OF LAND—POSSESSION. Possession does not take an oral sale of land out of the operation of the statute of frauds, where it was not referable to, or in execution of, the contract, but was without the consent of the vendor or after he had repudiated the sale or taken possession himself.

SAME. Permitting another to cut wood on the land is not the taking of such possession by the vendee as to take an oral sale out of the statute of frauds.

[1]Reported in 113 Pac. 257.

Appeal from a judgment of the superior court for King county, Frater, J., entered May 24, 1910, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action of ejectment. Reversed.

Skeel & Whitney, for appellants.

H. H. Benton and *Will H. Thompson*, for respondents.

Morris, J.—Appellants brought the action, asserting ownership of an undivided three-fifths interest in the land in controversy, and that they were entitled to the possession thereof, which possession was adversely claimed by respondents without right or title. Respondents answered, asserting their right to possession under an oral contract of sale, and prayed for a specific performance. Upon the issues thus framed, trial was had, and judgment entered as prayed for by respondents, from which this appeal is taken.

It is not denied that, in June, 1906, the parties entered into negotiations relative to the sale and purchase of the land. They differ somewhat as to the nature and extent of these negotiations, appellants contending that respondents sought to purchase the lands, and were informed by appellants that they only had an undivided one-half interest in the land at that time; that they would endeavor to obtain the remaining interest, and if so would sell to respondents at a price to be agreed upon; while respondents contend that appellants agreed to sell the land for $1,200 cash, claiming the entire title, but asserting a cloud which they would remove, and then convey. Whatever the contract was, respondents paid appellants $100 upon the purchase price, and appellants subsequently increased their title from an undivided one-half to an undivided three-fifths interest. Respondents sought to obtain this interest, and made a tender of the balance due. Appellants refused the tender, and in March, 1908, wrote respondents that they were unable to procure the remaining interest, and returned the $100 with $20 interest added. Upon

the receipt of this letter, respondents, on April 14, 1908, wrote appellants, saying:

"This is a great disappointment to me . . . I still believe that you would have gone ahead if you had been able to secure title from those people. I want this piece of property and I want you to give me a deed to your undivided interest, and I will negotiate with the other owners for their interest. Write me at once, please, what you think I ought to pay for your interest and forward deed to bank for collection. I think this is a fair proposition and, under the circumstances, one which you ought to accede to without delay."

About a week after writing this letter, respondents, through an attorney, again wrote appellants, returning the $120, and insisting upon a deed from appellants for the three-fifths interest at the price claimed to have been originally agreed upon, to which appellants responded declining to negotiate further respecting the property. Accepting the finding of the lower court that the contract was as contended for by respondents, we cannot read respondents' letter of April 14 other than as an acquiescence in appellants' inability to carry out the original agreement, and the commencement of new negotiations for a less interest, upon terms to be fixed by appellants. This, it seems to us, was a waiver of any claim of right under the first contract, and prevents respondents from now seeking its enforcement.

There is, however, another question presented to us by this record that demands a reversal of the judgment. Whatever the contract was, it was admittedly an oral one, and as such, under the universal ruling of all courts, is not enforceable, it being an oral contract for the sale of land, unless it falls within some recognized exception to such rule. Respondents admit such to be the rule applicable here, and contend that the case is without the statute of frauds because respondents were in possession. The facts upon which the claim of possession is based and upon which the court below decreed a specific performance, are these: The land in question consists of a two-acre unimproved piece on the outskirts of Seat-

tle. Some time in 1906, respondents stated to several persons that they owned the land and claimed possession. In 1908, the Seattle Electric Company cut some brush and small timber on the land, with the consent of respondents. Some time prior to 1908, respondents permitted a neighbor to cut some wood on the land. In the fall of 1908, a man named Wagner built a small stable on the land with respondents' knowledge and consent; it also appearing in this connection that Wagner had a written license or permission from appellants, dated April 9, 1909, to occupy the land. On April 23, 1909, respondents erected a small tent house upon the land at a cost of about $25.

It does not appear to us that the claim of ownership or consenting to the cutting of wood or brush on the land, the only acts from which respondents deduce possession prior to appellants' letter of March, 1908, and their answering letter of April 14, would be such possession as is contemplated by the law, in making possession a shield against the operation of the statute of frauds. Nor does it appear that any of these acts were with the knowledge or consent of appellants, which is a necessary ingredient in a sufficient possession. The acts subsequent to March, 1908, when appellants disclaimed their contract, could in no wise be held to be a possession growing out of, or taken in pursuance of, a contract then disaffirmed by one of the parties thereto and acquiesced in by the other. It might be it would be good as a possession if respondents were here claiming a title by prescription, based upon an adverse possession for the necessary time, but a possession to take a contract out of the statute of frauds cannot be an adverse possession. Under the great weight of authority, in order to enforce specific performance of a parol contract to convey land, the possession must have been transferred by the contract. Delivery is essential to its validity, and that delivery must be pursuant to the contract. *Swash v. Sharpstein*, 14 Wash. 424, 44 Pac. 862, 32 L. R. A. 796. Not only does the record disclose neither consent nor knowledge on the

part of appellants, but it affirmatively appears that any possession subsequent to March, 1908, would be an adverse act on the part of respondents, seeking to impress the land with their claim of right, growing out of appellants' refusal to convey rather than the oral contract to convey. There is no authority cited by respondents, nor is any known to us, that will support a claim of possession so made; it being universally held that possession must either be taken with the consent of the vendor, or held with his knowledge, without objection, from which latter fact consent will be presumed. *Christy v. Barnhart*, 14 Pa. St. 260, 53 Am. Dec. 538, and cases cited in note, where, in the main case, it is said:

"It is not to be disputed, at this time of day, that to withdraw a parol sale of lands from the blighting effect of the statute of frauds, there must be an open and absolute possession taken in pursuance of the contract, with a view to the performance of it;"

and as showing the extent to which this rule of possession flowing from and as a part of the contract has been carried, the court further says:

"It is, consequently, a settled rule that a parol sale to a tenant in possession is within the statute, though his possession be afterwards continued because there is no change of possession in execution of the contract."

In *Leslie v. Smith*, 32 Mich. 64, the defendant went upon the land a year after the contract was made, and it was held that such a taking of possession could not be held sufficient, as it could not be referred to the contract.

Pomeroy on Specific Performance, § 120, says:

"The possession must be actual and not merely nominal, open, visible and notorious, so that the fact can be certainly proved by the testimony of the eye-witnesses and not left to be inferred;"

and as against the contention of respondents, that permitting a neighbor to cut wood was an act of possession, Mr. Pomeroy, in a note to this section, cites *Fulton v. Jansen*, 99 Cal. 587,

34 Pac. 331, to the effect "that cutting wood on the land for family use is not a sufficient taking of possession."

The tent house built by respondents, and upon which they strongly rely as an evidence of their possession, was not built until after appellants had, on April 7, 1909, built a three-wire fence with cedar posts upon the property, thus plainly indicating their intention and purpose to claim possession of the property as against any act of respondents. The building of the tent house after that by respondents could not be held to be with the consent or knowledge of appellants, not attributable nor referable to the contract; but rather as an evidence of respondents' intention to hold adversely to appellants' claim of possession. Such a possession cannot be relied upon. In saying that possession must be referable to the contract, we do not mean to be understood as holding that the contract should in itself stipulate or provide for possession to be delivered; as we have heretofore held in *McKay v. Calderwood*, 37 Wash. 194, 79 Pac. 629, that it is not essential that the contract should so provide, but that it was sufficient that the possession be taken in pursuance and in execution of the contract, and with the knowledge of the vendor. Not finding any such possession disclosed in this record, we must give effect to the rule of the statute of frauds, and hold the contract of sale void.

The judgment is reversed, and the cause remanded for further proceedings as herein indicated.

CHADWICK and CROW, JJ., concur.

RUDKIN, J., concurs on the last ground discussed in the opinion of MORRIS, J.

[No. 9013. Department One. February 14, 1911.]

T. J. DONALDSON *et al.*, *Respondents*, v. MAGGIE M. WINNINGHAM *et al.*, *Appellants*.[1]

DEPOSITIONS—COMMISSION. Where a commission to take a deposition proves abortive, by reason of the refusal of a witness to sign a stenographic report, a second commission may be sued out.

INSANE PERSONS—GUARDIANS — APPLICATION — NOTICE. Notice of application to appoint a guardian for an insane person is properly served on her personally and on the person having her in charge at a hospital.

SAME—NOTICE—TIME—COMPUTATION. A notice of application for the appointment of a guardian of an insane defendant, served February 20, to be heard March 2, is served not less than ten days before the time of hearing, within the rule that the first day be excluded and the last day be included in the computation.

SAME—SERVICE OF NOTICE—PROCESS. Notice of application for the appointment of a guardian for an insane person may be served by a private person.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered January 12, 1910, in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action to quiet title. Affirmed.

John H. Allen, for appellants.

H. E. Foster, for respondents.

FULLERTON, J.—This cause was before this court in 48 Wash. 374, 93 Pac. 534, 125 Am. St. 937, and again in 54 Wash. 19, 102 Pac. 879. On the first appeal we held that the only question open to the appellant was whether she had been properly served with notice of the application for the appointment of a guardian of her person and estate while she was confined in the hospital for the insane, and a new trial was ordered with direction to admit evidence upon that question. After the cause was remanded,

[1]Reported in 113 Pac. 285.

evidence was taken upon the question suggested by depositions, and on the second appeal it was held that the proceedings had in taking the depositions were so far irregular as to require their exclusion, and the cause was remanded for further proceedings. On the remand of the case, depositions were again taken on the disputed question. The procedure had in taking these last depositions is questioned on this appeal.

It appears that a commission was sued out to take the deposition of a certain Dr. Van Zandt; that at the time and place appointed for taking the deposition, the parties appeared and stipulated that the questions and answers should be taken in shorthand by a stenographer, and afterwards transcribed in longhand by him, when they should be signed by the doctor. The deposition was so taken and so transcribed, but when it was presented to the doctor he discovered so many errors in it that he refused to sign it. The respondent thereupon sued out another commission under which the deposition was regularly taken. This last commission was issued over the objection of the appellant, and she now insists that the court erred in issuing it. But we are clear no error was committed in this behalf. There is no prohibition in the statute against issuing a second commission to take the deposition of a party when the first proves abortive, and plainly the interest of justice requires such a course.

On the question of the service of the notice, a number of objections are made. It is insisted first that the proofs were not sufficient, but on this question we think the proofs ample to show a service in strict compliance with the statute. According to the attendants at the asylum, the notice was served both upon appellant personally and upon the person having her in charge.

Next it is said that the time of service was too short. The statute provides (Laws 1903, p. 242), that when an application is made for the appointment of a guardian for an insane person, the court shall cause notice thereof to be given

such insane person of the time and place of hearing the application, "not less than ten days before the time so appointed." In this instance the time appointed for hearing the application was March 2, 1905, and the notice was served on the insane person and upon the person having her in charge, on February 20, 1905. By excluding the first day and including the last in the computation, according to the rule of the statute, the service was made "at least ten days before" the time of the hearing.

The third objection is that the service was void because made by a private party and not an officer of the law empowered by statute to make service, but the procedure taken is authorized by statute. It is provided by the statute that the laws of the state of Washington, "relating to the manner of service of summons" shall apply to the service of the notice therein provided for. A summons may be served by a private party, and we think the legislature meant to allow notices to be likewise served, even though the language used, technically construed, would seem to require a more narrow interpretation.

The other objections to the guardianship proceedings seem to us to suggest matters of error rather than jurisdictional questions. As such they cannot be considered in this form of action.

The judgment is affirmed.

PARKER, GOSE, and MOUNT, JJ., concur.

[No. 9302. Department One. February 16, 1911.]

STAR PUBLISHING COMPANY, *Respondent*, v. KNOSHER & COMPANY, INCORPORATED, *Appellant*.[1]

CONTRACTS—MODIFICATION—CANCELLATION. A modification whereby a contract for advertising space on three days in the week was changed so as to take all the space on one day of the week does not amount to a cancellation of the contract.

CONTRACTS—BREACH—DAMAGES. Damages for breach of an advertising contract are not limited to the profits, but cover the full contract price, where the contract gave the newspaper the option to hold the space open or to utilize it for other purposes and in either event receive the full compensation fixed in the contract.

SAME—MEASURE OF DAMAGES—BURDEN OF PROOF. *Prima facie*, the measure of damages for the breach of an advertising contract is the contract price, and the burden is upon the party in default to show facts in mitigation thereof.

Appeal from a judgment of the superior court for King county, Albertson, J., entered September 21, 1910, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on contract. Affirmed.

J. P. Wall, for appellant.

Brightman & Tennant, for respondent.

GOSE, J.—On the 8th day of August, 1909, the plaintiff and the defendant entered into a contract, the body of which is as follows:

"We hereby contract with the Star Publishing Company for advertising space in the Seattle 'Star,' and the Star Publishing Company hereby sells space and agrees to carry and print in each space in the Seattle 'Star' advertising matter to consist of not less than 100 inches of display advertising space to be used each week for a period of one year from date, said space to be used as follows: 30 inches or more each Monday and Wednesday and 40 inches or more each Friday,

[1]Reported in 113 Pac. 569.

for which we agree to pay fifty-five (55) cents per inch for all space used and contracted for.

"This contract is an entirety covering the period above mentioned. Bills are to be presented monthly and paid within ten (10) days after presentation, and if not so paid within ten (10) days after presentation, the Star Publishing Company, may, at its option, take the advertisement out of the Seattle 'Star,' in which event the time said advertisement is not run shall not be counted as part of the above period contracted for; but the termination of said period may be extended, covering the time said advertising was omitted. Or the Star Publishing Company may hold said space at advertiser's disposal for the full period aforesaid, notwithstanding such default in payment and collect therefor the full contract price. Copy is to be furnished not later than six o'clock p. m. of the day previous to insertion; and Monday copy not later than six p. m. the Saturday previous. Should the advertiser fail to furnish copy as provided in this contract, or should copy furnished not meet with approval of Star Publishing Company, then Star Publishing Company may continue to charge for said space until new copy is furnished. All matter is subject to the approval of the Star Publishing Company."

The plaintiff brought suit upon the contract to recover the stipulated compensation for the months of March, April, and May, 1910. The defendant pleaded affirmatively that in December, 1909, the contract was modified by the mutual consent of the parties, to the extent that the entire one hundred inches of space should be used on Friday of each week, instead of on three days of each week as specified in the contract, and that the contract was annulled on the 23d day of February, 1910. This was put in issue by the reply. The court found that the contract was modified to the extent that the entire space should be used on Friday of each week, but that it was not annulled; that before March, 1910, the defendant sought to cancel the contract, and thereafter declined to furnish further advertising matter; that the plaintiff at all times stood ready and able to carry out the contract, and refused to acquiesce in the defendant's demand for its cancella-

tion. A judgment was entered in favor of the plaintiff for the amount stipulated in the contract, for the months of March, April, and May, 1910. This appeal followed.

The evidence shows that the advertisement was published in one issue in March, that it was not thereafter published, owing to the refusal of the appellant to furnish the advertising matter, and that the space stipulated in the contract was thereafter used for other purposes.

The appellant first contends that the contract was cancelled by the mutual agreement of the parties. This contention has no support in the evidence. The only modification in the contract was that the entire space should be used in one issue of each week instead of being distributed through three issues. It is clear that this was a modification only in the respect stated, and not a cancellation. One party to a contract cannot escape liability by refusing to perform it. To make or annul a contract requires a meeting of minds of the parties upon the subject-matter.

The appellant next suggests that, if it breached the contract, its liability is limited to the profit that would have resulted to the respondent from its performance, and that, the respondent having failed to offer any evidence on that subject, the judgment should have been against it. This position is untenable, because the contract provides that, in default of payment as stipulated, the respondent "may hold such space at advertiser's disposal for the full period fixed, notwithstanding such default in payment, and collect therefrom the full contract price;" or that, "should the advertiser fail to furnish copy as provided in the contract, or should copy furnished not meet with the approval of the Star Publishing Company, the Star Publishing Company may continue to charge for such space until new copy is furnished." If any meaning is to be given to the clause last quoted, it becomes evident that the respondent reserved either of two options, viz., (1) to hold the space open, or (2) to utilize it for other purposes for the breach stated, and in either event

to receive the compensation fixed by the contract. The parties themselves have fixed the damages in case of a breach of the terms of the contract, and it does not lie with the court to change or vary it.

However, if we should adopt the view that the profits of the contract are the measure of the appellant's liability, the burden would be upon it, as in contracts for personal services, to show the facts in mitigation of damages, upon the ground that *prima facie* the measure of damages is the contract price. *Ware Bros. Co. v. Cortland Cart & Carriage Co.*, 122 N. Y. 489, 85 N. E. 666; *McDermott v. De Meridor Co.* (N. J.), 76 Atl. 331.

The judgment is affirmed.

DUNBAR, C. J., FULLERTON, MOUNT, and PARKER, JJ., concur.

[No. 9158. Department One. February 17, 1911.]

In re FIFTH AVENUE AND FIFTH AVENUE SOUTH, SEATTLE. W. L. O'CONNELL *et al.*, *Appellants*, v. THE CITY OF SEATTLE, *Respondent*.[1]

EMINENT DOMAIN—IMPROVEMENTS—DAMAGES—CHANGE OF GRADE—PERSONS INJURED. Injury inflicted upon property in the neighborhood of a street by a regrade and diverting of travel is *damnum absque injuria*, where the property does not abut on the regraded street, and is not within Const., art. 1, § 16, prohibiting the damaging of property without just compensation; since the injury differs not in kind but only in degree from that suffered by the public generally.

COURTS—STARE DECISIS—CONSTITUTION—CONSTRUCTION. The rule of *stare decisis* is peculiarly applicable to constructions of the constitution, which should not be changed except for the most cogent reasons.

Appeal from a judgment of the superior court for King county, Ronald, J., entered May 19, 1910, upon the verdict of a jury of no damages, in an action to condemn property for

[1]Reported in 113 Pac. 762.

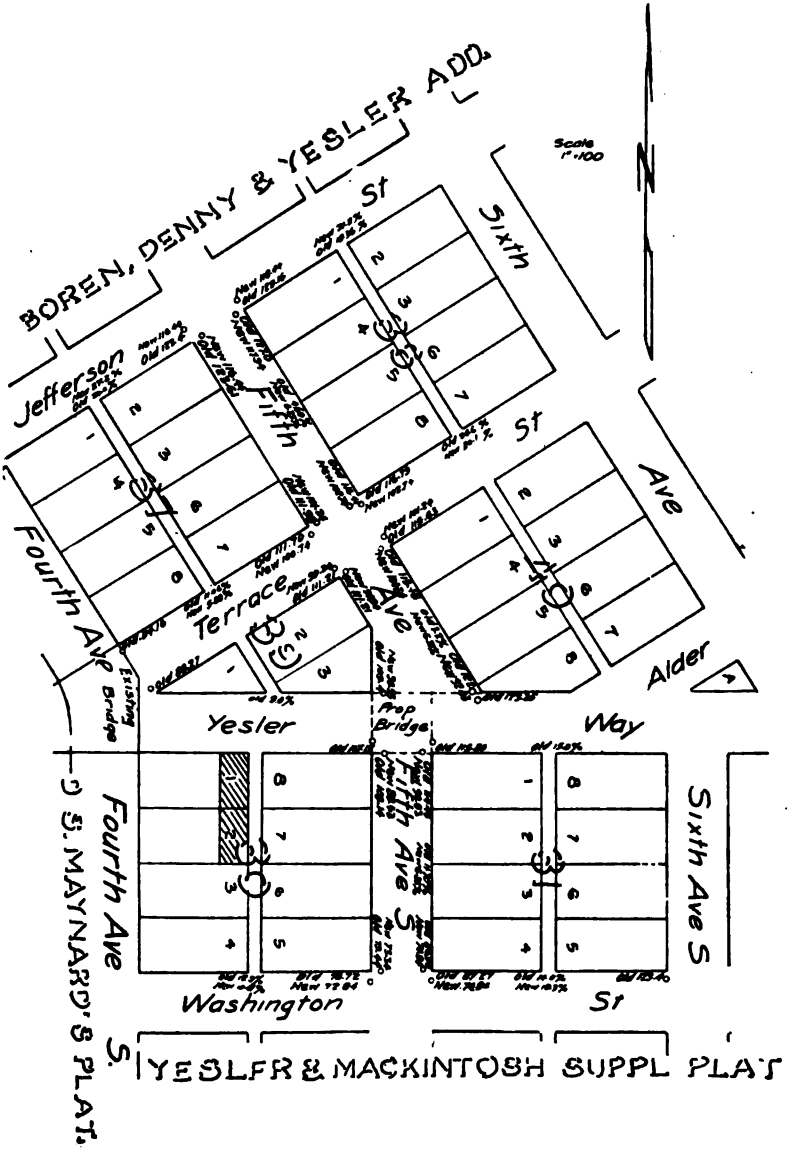
the purpose of changing and establishing the grades of streets. Affirmed.

F. C. Reagan, for appellants.

Scott Calhoun and *Bruce C. Shorts*, for respondent.

Gose, J.—This action was brought by the city of Seattle to take and damage private property, for the purpose of changing and reestablishing the grade of Fifth avenue and Fifth avenue south from Madison street to Jackson street. Yesler way runs east and west, Fifth avenue runs southeasterly, and Fifth avenue south runs north and south. The appellants are the owners of an improved tract of land having a frontage of thirty feet on the south side of Yesler way and a depth of sixty feet. The property is one hundred and thirty-six feet west of the west line of Fifth avenue south, extends along the west side of an alley which is sixteen feet in width and midway between Fourth avenue and Fifth avenue south, and extends south from Yesler way to Washington street. The proposed regrade will lower the present grade of Fifth avenue south at Yesler way about nineteen feet at the southwest point of intersection, and about twenty-four feet at the north line of intersection. The present grade on Yesler way will be retained by means of a viaduct or bridge across Fifth avenue south. The approaches from Fifth avenue south to Yesler way under the regrade will be by means of steps, some thirty-four in number. Fourth avenue lies immediately west of, and parallel with, Fifth avenue and Fifth avenue south. There is an ascending grade of nine per cent from Fourth avenue to Fifth avenue south. Terrace street is the first street north of Yesler way. It runs at an angle, and intersects Yesler way at Fourth avenue. Fourth avenue has been regraded, and there is a bridge or viaduct across it so as to connect Terrace street and Yesler way. A flight of steps, similar to that projected at Fifth avenue, leads from Fourth avenue to Yesler way. The appended map will disclose the

relation of the appellants' property to the improvement and to the adjacent property:



The appellants offered testimony tending to show that the regrade and viaduct will damage their property from five to ten thousand dollars, and that twenty to twenty-five per cent of the people who travel Yesler way in front of their property come from Fifth avenue and Fifth avenue south. The respondent's testimony tends to show that, without considering any benefit that will accrue from the improvement, no damages will result to the appellants' property. The court instructed the jury that:

"Every owner of property bordering upon the street has a right of access, light and air therefrom, which right is an appurtenant to the land, and any physical impairment of that right is regarded as actionable. Such an injury is one peculiar to the landowner and not shared in kind by others. Where the injury complained of is an obstruction or an excavation, and not adjacent to the land of the person in question but to a street in the neighborhood which he uses or might use in common with the public in general, he has no right of action as an owner of injured property. That he might use the street more often than most of all others makes a difference only in degree and not in character, and does not entitle him to damages by reason of his property."

The jury then inquired what was meant by the word "adjacent;" whether it meant to abut upon the street; to which the court replied that it should border upon the street. The jury found that the appellants' property is not damaged, and the judgment makes the verdict in this respect effective. The correctness of the instruction is challenged by the appeal.

The appellants earnestly insist that the instruction is violative of art. 1 § 16, of the constitution, which provides:

"No private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court for the owner."

At common law, where the work of regrading the street was done with the usual care and skill, there was no liability for consequential damages. The injury inflicted in such cases was, in legal terminology, *damnum absque injuria*. The de-

nial of the right of the property owner to recover consequential damages was put upon the ground that his right must yield to the promotion of the public interest. *Reardon v. San Francisco*, 66 Cal. 492, 6 Pac. 317, 56 Am. St. 109. The remedy has been extended by our constitution, as we have interpreted its meaning, so as to give an owner of property abutting upon the part of the street excavated or obstructed, or one who has sustained an injury differing in kind from that suffered by the public generally, the right to recover consequential damages. In *Smith v. St. Paul Minn. & M. R. Co.*, 39 Wash. 355, 81 Pac. 840, 109 Am. St. 889, the plaintiffs owned two lots fronting upon Bridge avenue, a public street sixty feet in width. The lots extended northerly one hundred and seventeen feet along the line of Cannon street, which was also sixty feet in width. The railway company had constructed and was operating a railway line which passed in front of the plaintiffs' property for a distance of a quarter of a mile to the east, for half a mile to the west, and paralleled Bridge avenue at a distance of sixty-three and one-half feet from its south line. In front of the plaintiffs' property and for some distance on both sides, there was a cut of some twelve feet in depth in which the railway track was laid. The nearest rail was one hundred and twenty-three and one-half feet distant from the nearest point of plaintiffs' property. Some of the cuts on the cross-streets were covered with wooden bridges, whilst others were left uncovered. The plaintiffs claimed that these cuts made their property less accessible, and claimed damages therefor. In denying their claim for damages in this behalf, the court said;

"It is urged that the excavations made through the cross-streets in respondents' neighborhood constituted an injury for which they are entitled to damages. We think not. If the railroad was constructed in the public street adjacent to respondents' lots, they would be entitled to recover whatever damages were occasioned thereby. This is upon the theory that every owner of property bordering upon the street has a right to access, light, and air therefrom, which right is an

appurtenant to the land, and any physical impairment of that right is regarded as actionable. Such an injury is one peculiar to the land owner, and not shared in kind by others. But where the injury complained of is an obstruction, not adjacent to the land of the person in question, but to a street in the neighborhood which he uses, or might use, in common with the public in general, he has no right of action as an owner of injured property. That he may use the street more often than most or all others, makes a difference only in degree and not in character, and does not entitle him to damages by reason of injury to his property."

From the facts stated it is obvious that the court used the words "bordering" and "adjacent" as synonymous terms. In *Ponischil v. Hoquiam Sash & Door Co.*, 41 Wash. 303, 83 Pac. 316, the western half of a cross-street between two blocks was vacated, forming a cul-de-sac. The owner of the most easterly lot on the south side of the street sought to recover damages. It was held that, not being an abutting owner, he suffered no damage differing in kind from that sustained by the general public, and that a difference in degree only would not support a recovery. The same doctrine was announced in *Mottman v. Olympia*, 45 Wash. 361, 88 Pac. 579. In that case the city had vacated a street for a distance of one block. The plaintiff's property abutted upon the street. There was a cross-street between his property and the vacated portion of the street upon which his property abutted. The court, in denying relief, said:

"For the only practical effect that it has on appellants' egress and ingress is the deflection one block either east or west of the travel coming from the residence portion between Washington street and Franklin street, and that is too slight a consideration, we think, to be controlling in a case of this kind. It will be remembered that the appellants' property does not abut on the street vacated."

The appellants have cited *Brown v. Seattle*, 5 Wash. 35, 31 Pac. 313, 32 Pac. 214, 18 L. R. A. 161; *Fletcher v. Seattle*, 43 Wash. 627, 86 Pac. 1046, 88 Pac. 843; *Brazell v. Seattle*, 55 Wash. 180, 104 Pac. 155; *Sholin v. Skamania Boom Co.*,

56 Wash. 303, 105 Pac. 632; and *Sweeney v. Seattle*, 57 Wash. 678, 107 Pac. 843. The *Brown, Fletcher, Brazell* and *Sweeney* cases have reference to property abutting upon the improvement. *Lund v. Idaho & Washington N. R.*, 50 Wash. 574, 97 Pac. 665, 126 Am. St. 916, presents a like question. The *Sholin* case arose out of a tort in the nature of an obstruction of a public highway, resulting from the negligent destruction of a bridge which was built across Wind river and formed a necessary part of the highway. It cannot be doubted that actions prosecuted for the unlawful obstruction of a highway are controlled by principles of law radically different from those obtaining where an improvement of a street or highway is being prosecuted by civil authority in a lawful way.

If the question were *res nova* in this court, the writer would strongly incline to the view announced in Nebraska and Illinois, in *City of Omaha v. Kramer*, 25 Neb. 489, 41 N. W. 295, 13 Am. St. 504, and *Rigney v. Chicago*, 102 Ill. 64, viz., that if the property is diminished in actual value by reason of a public improvement, without considering any benefits resulting from the improvement, it is to the extent of the diminution taken or damaged for a public use, and that a trespass or an actual physical invasion of the property is not an essential prerequisite to a right of recovery; or, stated in another form, that the right of recovery should not be limited to cases of an actual physical contact of the property with the excavation or obstruction, but should be submitted to the jury as a question of fact in all cases where, upon the evidence, the minds of men might reasonably differ as to whether the property was in fact damaged in a degree greater than that suffered by the public generally. It seems to the writer that any arbitrary attempt to limit the right to recover damages to the abutting owner is illogical. It is apparent, however, from the facts stated, that the injury suffered by the appellants differs in degree only, and not in kind, from that sustained by the public generally. If twenty to twenty-five per cent of the travel in front of their property comes from Fifth

avenue, property owners on Yesler way west to the bay may consistently claim that at least a portion of that travel would continue to the end of the way. The difference would be one of degree only. The same principle would apply to the owners of property on Yesler way east of Fifth avenue and Fifth avenue south. The rule of *stare decisis* is peculiarly applicable to the construction of the constitution. The interpretation of that document should not be made dependent upon every change in the personnel of the court. When one of its clauses has been once construed, that construction should not be set aside except for the most cogent reasons. Certainty in the law is of the first importance.

It may be said, in support of the view hitherto adopted, that the right to recover damages in cases of this character is determinable by a uniform rule of law, and is not left open for the varying determination of juries. The appellants' property not abutting upon the improvement, and the injury to their property not differing in kind but in degree only from that sustained by the public generally, there was no question of fact to submit to the jury.

The judgment is affirmed.

Fullerton, Mount, and Parker, JJ., concur.

[No. 9331. Department One. February 17, 1911.]

ETTA MAY COLE *et al.*, *Respondents*, v. JOHN GERRICK *et al.*, *Appellants*.[1]

MASTER AND SERVANT—DEATH OF EMPLOYEE—PROXIMATE CAUSE—QUESTION FOR JURY. Where a structural iron worker, standing on a fresh or green wall at the top of a building, had hold of a channel beam for the purpose of assisting to "drift" it into place, and by reason of an error in communicating or obeying a signal to lower the beam, the engineman swung the beam way from the wall, and the iron worker was pulled out before he could let go, and fell, some of the freshly laid bricks giving way under his feet, the proximate cause of the accident was the error in giving or obeying the signal, and the extent to which the insecure wall contributed thereto was a question for the jury.

SAME—CONCURRING CAUSE—LIABILITY. Where the master is liable for the proximate cause, or one of the causes of the accident, it is immaterial that he was not responsible for a contributing cause.

MASTER AND SERVANT—NEGLIGENT SIGNALS—VICE PRINCIPALS. A master is liable for the death of a structural iron worker, who fell through the negligence of coemployees in communicating or obeying a signal to the engineman at a hoisting derrick.

SAME—CONTRIBUTORY NEGLIGENCE—UNSAFE METHODS. A structural iron worker is not guilty of contributory negligence as a matter of law, in going upon a fresh or green wall to assist in "drifting" a beam into place, where he was not warned of the condition of the wall, it was not unusual to go upon the walls, and that was the best position for him to take to render such assistance, although there were other positions he might have taken (GOSE and MOUNT, JJ., dissenting).

Appeal from a judgment of the superior court for King county, Main, J., entered October 31, 1910, upon the verdict of a jury rendered in favor of the plaintiff, in an action for wrongful death of an employee engaged as a structural iron worker in the erection of a building. Affirmed.

Milo A. Root, for appellants.

Walter A. Keene, for respondents.

[1]Reported in 113 Pac. 565.

PARKER, J.—This is an action to recover damages from the defendants, alleged to be the result of their negligently causing the death of George Cole, the husband and father of the plaintiffs. A trial before the court and a jury resulted in a verdict and judgment in plaintiffs' favor, from which the defendants have appealed.

The argument of learned counsel for appellants is directed almost wholly to the alleged error of the trial court in denying their challenge to the sufficiency of the evidence to support the verdict and judgment in respondents' favor, made at the close of the trial and renewed in their motions for judgment notwithstanding the verdict and for a new trial.

The evidence was in serious conflict upon some of the important questions, but a careful review of the record convinces us that there was competent evidence sufficient to warrant the jury in concluding that the following facts were established. On February 19, 1910, the appellants were contractors engaged in constructing the iron framework of the Fidelity Trust building in Tacoma, and George Cole, the deceased, was then employed by them as a structural iron worker on the building. On that day Cole fell from the top of the north wall of the building, which was then up to the thirteenth floor, to the roof of another building some six stories lower, resulting in his death. At that time the iron framework and walls of the building had been completed up to the twelfth floor. The north wall had been completed up to the thirteenth floor, and the iron framework had been put in place on the thirteenth floor on a considerable portion of the north half of the building. There was placed about the center of the building on the twelfth floor a large derrick which was used for hoisting the material from the street, and also for placing the material at various points on the building as became necessary. This derrick had a long swinging boom, from the end of which hung the cable for handling the material. This cable ran from the iron or material to be handled, through a pulley at the outer end of the boom, down to

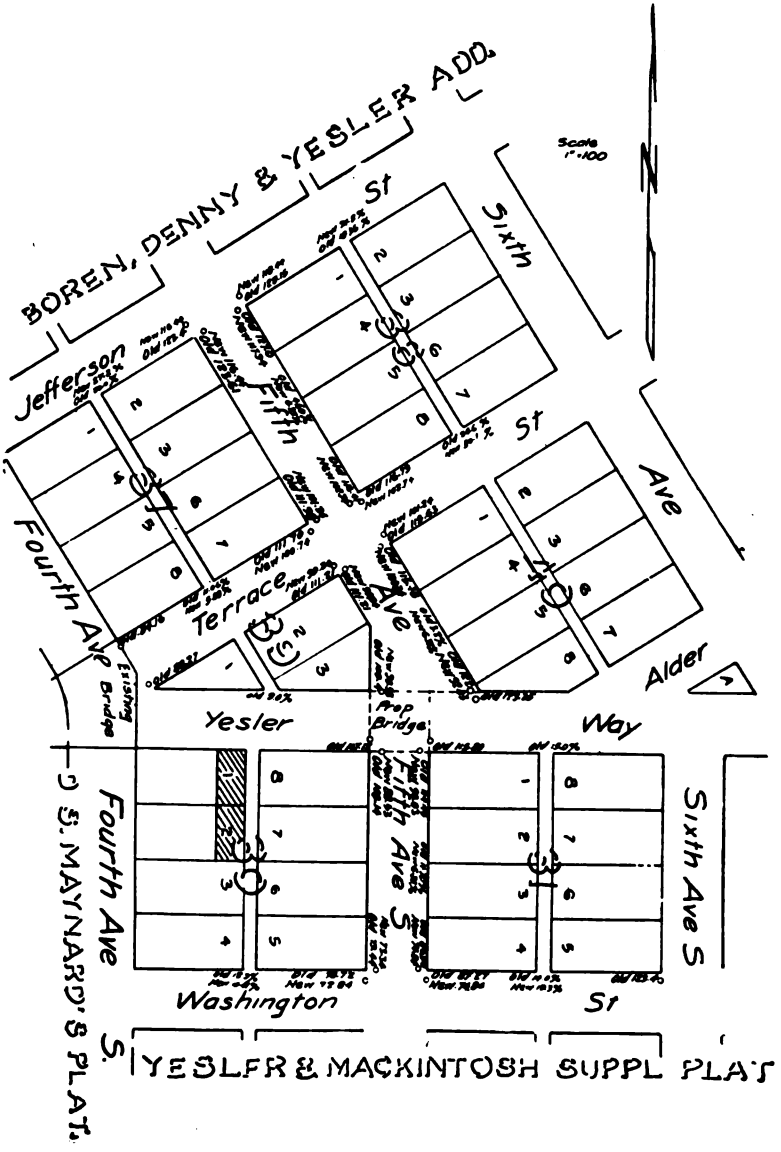
the foot of the derrick through a pulley, and on down to the engine situated six stories below. Another cable, permanently attached to the outer end of the boom, ran to the top of the derrick through a pulley and on down to the engine. By this cable the boom could be lowered so as to extend the outer end of it over the edge of the building, or could be raised so as to bring cable suspended from its outer end over any point between the foot of the derrick and the outer wall. Another cable ran from the derrick down to the engine, adjusted in such manner that the boom could thereby be swung around over any part of the building. The engine supplied the power which controlled all three of these movements. These various movements were controlled by the men in charge of the engine, in obedience to signals communicated to them by a bell and wire extending up to the story at which the work was progressing.

It will thus be seen that the material could, by this derrick, be placed at any point on the story being constructed, provided there was nothing to interfere with the raising, lowering or swinging of the boom. Immediately preceding the falling of Cole off of the north wall, he and another iron worker named Mitchell, and the foreman, were attempting to place in permanent position an iron channel beam, about twelve feet long and weighing about 300 pounds, along the inner edge of the north wall at the thirteenth floor. At that time the framework of that floor on the north portion of the building so interfered with the lowering and swinging of the boom that it was not possible to suspend and lower this channel by the cable from the outer end of the boom exactly over the final resting place of the channel. The nearest it could be so suspended over its final position was about six feet to the west and about two feet to the south inside the wall. When put in position it was to be attached by rivets or bolts at its easterly and westerly ends to I beams resting upon the wall, and running at right angles thereto towards the interior of the building. These I beams were then already in place. Cole

was to guide the easterly end of the channel into place, while Mitchell was to guide the westerly end into place, as the channel would be lowered. The channel had reached a position so it was suspended from the outer end of the boom at a point as nearly as possible over its final resting place; that is, about six feet west and about two feet south, parallel with the wall, and some five or six feet above the wall. It hung some thirty-five feet below the outer end of the boom, which enabled the men to move it to its proper position while being lowered. This process is called "drifting," and except in handling all but very heavy pieces, renders it unnecessary to have them suspended and lowered with any great degree of precision over their final resting place.

While the channel was in this position, the foreman, standing on the westerly I beam immediately to the south of the suspended channel, took hold of it with his hands; while Mitchell, standing partly on the wall end of the westerly I beam and partly on the wall, being on the north side of the suspended channel, took hold of it with his hands. At the same time Cole stepped from his position at the wall end of the easterly I beam along the top of the wall to a point about half way between the I beams, which were about twelve feet apart, that being the length of the channel, for the purpose of taking hold of the easterly end of the channel and assisting in drifting it to its proper position as it would be lowered. He there took hold of the channel as the others did, reaching towards the interior of the building about two feet, where it was suspended. The foreman then communicated to one Lee, who stood in a position some distance away towards the foot of the derrick, a signal to lower the channel. This was given by word of mouth, was plainly heard by Mitchell, and must have been heard by Cole, who was then not over ten feet from the foreman. Lee in turn communicated a signal to one Huston, the bell man, who stood by the bell wire at the foot of the derrick, and who in turn communicated a bell signal to the men in charge of the engine below. The engine and the men

relation of the appellants' property to the improvement and to the adjacent property:



The appellants offered testimony tending to show that the regrade and viaduct will damage their property from five to ten thousand dollars, and that twenty to twenty-five per cent of the people who travel Yesler way in front of their property come from Fifth avenue and Fifth avenue south. The respondent's testimony tends to show that, without considering any benefit that will accrue from the improvement, no damages will result to the appellants' property. The court instructed the jury that:

"Every owner of property bordering upon the street has a right of access, light and air therefrom, which right is an appurtenant to the land, and any physical impairment of that right is regarded as actionable. Such an injury is one peculiar to the landowner and not shared in kind by others. Where the injury complained of is an obstruction or an excavation, and not adjacent to the land of the person in question but to a street in the neighborhood which he uses or might use in common with the public in general, he has no right of action as an owner of injured property. That he might use the street more often than most of all others makes a difference only in degree and not in character, and does not entitle him to damages by reason of his property."

The jury then inquired what was meant by the word "adjacent;" whether it meant to abut upon the street; to which the court replied that it should border upon the street. The jury found that the appellants' property is not damaged, and the judgment makes the verdict in this respect effective. The correctness of the instruction is challenged by the appeal.

The appellants earnestly insist that the instruction is violative of art. 1 § 16, of the constitution, which provides:

"No private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court for the owner."

At common law, where the work of regrading the street was done with the usual care and skill, there was no liability for consequential damages. The injury inflicted in such cases was, in legal terminology, *damnum absque injuria*. The de-

necessary to show that one of the co-operating causes of the injury was a culpable act or omission for which the master was responsible. This rule holds good whether the other causes were also defaults for which he was responsible, or were due to some event or some conditions for which he was not required to answer."

To the same effect is Black's Law and Practice in Accident Cases, § 21. The liability of the appellants growing out of the wrong communication of, or erroneous acting upon, signals under such conditions as this evidence tends to prove, we think has been fully established by former decisions of this court. *Westerlund v. Rothschild*, 53 Wash. 626, 102 Pac. 765.

It is contended that Cole was guilty of contributory negligence in going upon the wall when he could have stationed himself and waited on the wall end of the easterly I beam where he was to guide that end of the channel into place, or that he could have walked on the scaffold used by the masons on the inside of the wall a few feet lower down. In other words, it is insisted that he chose an unsafe way when there were two other safe ways. We cannot so decide, as a matter of law, in this case. The going upon the wall was clearly not an unusual thing, nor, of itself, regarded as particularly dangerous by these men in this class of work; and there was no evidence indicating that the appearance of the wall indicated its unsafe condition. It is true Cole was not directly ordered to go there; but he evidently went there because he deemed it his duty to assist in drifting the channel over to its proper position while being lowered, rather than to wait at the wall end of the easterly I beam for the others to drift the channel over to him to put into place. Even the foreman's testimony does not indicate that he regarded this act of Cole's as unusual or particularly dangerous or out of the line of his duty, except for the fact that the wall was not yet set, thus furnishing an insecure footing. It is plain that Cole, from his position on the easterly I beam, could not reach the channel as sus-

pended, and it was only by going upon the wall as he did that he was enabled to assist in drifting the channel into place. Under these circumstances we are not able to say, as a matter of law, that he was guilty of contributory negligence. The evidence tends to show that, by getting down upon the scaffold, Cole could not have reached the channel by reason of the height at which it was suspended, until it was lowered nearly to its resting place. This would not only have been an unusual thing for him to do, but he could not have rendered as much assistance in drifting it to its place as he could upon the wall.

We are of the opinion that neither the question of appellants' negligence, or Cole's contributory negligence in choosing an unsafe way when other safe ways were open, could be decided as matters of law, but were properly left to the jury.

We are not able to say that other assigned errors were prejudicial to appellants' rights, since we are not cited to pages of the record enabling us to properly discuss them, besides they are submitted to us practically without argument.

The judgment is affirmed.

Dunbar, C. J., and Fullerton, J., concur.

Gose, J. (dissenting)—It seems clear to me that the death of the deceased was due to his own negligence. Two safe ways were open to him. He could have performed his work in safety from either the I beam or the scaffold inside the wall. The channel was lowered by machinery. It could be done in no other way. The deceased merely assisted in "drifting" and adjusting it to place. I therefore dissent.

Mount, J., concurs with Gose, J.

[No. 9276. Department One. February 17, 1911.]

HERMAN ALLENBERG *et al.*, *Plaintiffs*, v. MORTON D. WAINWRIGHT *et al.*, *Respondents*, AND EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, *Intervener and Appellant*.[1]

EVIDENCE—PAROL TO EXPLAIN WRITING—CONTRACTS—CONSTRUCTION—AMBIGUITY. Receipts for advances, given by general agents to an insurance solicitor, are not so clear and certain as to exclude oral evidence of the real intention of the parties as to the solicitor's personal liability thereon, where they provided that the sum with interest shall constitute a lien upon and be repaid from "commissions and percentage allowances accruing to me," and that "any balance outstanding upon the termination of my contract arrangements shall thereupon become immediately due and payable by me in cash;" the solicitor having been arbitrarily discharged without cause assigned within one year, and the percentages accruing for twelve years if policies were kept up that long.

SAME. The same is also true of similar receipts, providing for repayment in cash of the sum received, with interest, on a date left blank, and that the "advance shall constitute a lien upon and be repaid" from the commissions and percentages, as in the other case.

INSURANCE—COMMISSIONS—ADVANCES TO AGENT—LIABILITY FOR REPAYMENT. Where such receipts were given with the understanding that the advances were to be repaid only out of commissions and percentages accruing to the solicitor, he cannot be held personally liable thereon, especially where he was arbitrarily discharged without cause assigned before the lapse of the time within which percentages might accrue.

SAME—RIGHTS OF COMPANY—BILLS AND NOTES—BONA FIDE HOLDER. In such a case, where suit was brought by the general agents, and the insurance company intervened as the real party plaintiff, the company cannot claim to be a *bona fide* holder of the receipts for value, the intervention appearing to be based upon the theory that acceptance of the receipts by the general agents was the act of the company.

Appeal from a judgment of the superior court for King county, John S. Jurey, Esq., judge *pro tempore*, entered

[1]Reported in 113 Pac. 585.

June 7, 1910, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action on contract. Affirmed.

H. A. P. Myers and *Walter L. Johnstone*, for appellant.

Philip Tindall, *Vince H. Faben*, and *S. H. Kelleran*, for respondents.

PARKER, J.—This action was commenced by the plaintiffs to recover from the defendants $1,981.47, alleged to be due upon a number of obligations in writing, which for convenience we will call receipts, signed by the defendant, Morton D. Wainwright. These receipts were all in one or the other of the following forms:

"Oct. 30, 1905.

"Received of Allenberg & Fleming the sum of twenty-five dollars ($25) as an advance, upon the understanding that until said amount shall have been fully repaid with interest, the same shall constitute a lien upon and be repaid from any and all first year's and renewal commissions and percentage allowance accruing to me in any manner whatsoever, with interest at the rate of five per cent (5%) per annum, to be computed up to and paid annually on the 31st day of December in each year; any and all compensation accruing being applied first to the payment of interest upon the total indebtedness on said December 31st in each year and afterwards to the payment of the principal sum then due; it being further understood that any balance outstanding upon the termination of my contract arrangements shall thereupon become immediately due and payable by me in cash with interest.

"Approved, A. & F. Morton D. Wainwright."

"5-3-04.

"Received of Allenberg & Fleming the sum of twenty-five dollars ($25) as an advance, which I agree to repay in cash, with interest at the rate of five per cent (5%) per annum, by ..... 190.., and until repaid with interest. I hereby agree that said advance shall constitute a lien upon and be repaid from any and all first year's and renewal commissions and percentage allowance accruing to me in any manner

whatsoever, with interest at the rate of five per cent (5%) per annum; the understanding being that any and all renewal commissions accruing to me shall be applied first to the payment of interest upon the total indebtedness, and afterwards to the payment of the principal sum then due, until the same shall have been fully paid.

"Approved, A. & F. Morton D. Wainwright."

These receipts were all printed forms with no blanks, save for the date, for the name of the plaintiffs, for the amount, and in the second form, for the date of maturity. The blank in the second form for inserting the date of maturity was left unfilled in all the receipts of that form. After the commencement of the action, the Equitable Life Assurance Society intervened, claiming to be the real party in interest as plaintiff. A trial before the court resulted in findings and judgment in favor of the defendants. The intervener has appealed.

The construction of the receipts sued upon, and the admission of oral evidence touching the defendants' personal liability thereunder, are the questions involved. It is contended in behalf of the intervener that these receipts evidence absolute personal debt obligations on the part of the defendants, which cannot be varied or explained by parol evidence, and that no question of fact is properly in the case save the question of the amount of credits the defendants are entitled to upon such obligation. It is contended in behalf of the defendants that these receipts do not evidence personal indebtedness against them; that if it be held that a strict construction of the language of the receipts does evidence such an indebtedness, then that they were signed under a mutual mistake on the part of both defendant Morton D. Wainwright and the plaintiffs as to the import of the language therein used; that the evidence introduced and admitted by the court to show the real nature of the obligation intended by the parties was admissible; and that the defendants are not liable beyond the commissions accruing to the defendant Morton D. Wainwright.

upon insurance procured and written by him for the intervener and the plaintiffs, its general agents.

The facts are practically undisputed, and so far as necessary for us to notice them, are as follows: At the time of the signing of these receipts by the defendant Morton D. Wainwright, the plaintiffs were the general agents of the intervener, located at Seattle, and acting as such under the firm name of Allenberg and Fleming. They were authorized to employ subordinate agents to solicit insurance for the intervener, and accordingly employed Morton D. Wainwright, who was to receive certain commissions upon the insurance procured by him, not only upon the first year's premiums, but also upon the premiums to be paid thereon from the second to the twelfth years inclusive. The contract for this employment was in writing, under which the employment was to continue until March 18, 1906. About the time of making the contract, a considerable prejudice had been excited in the public mind against certain life insurance companies, including the intervener, and it was found very difficult for solicitors to procure insurance. Wainwright discovered this difficulty, and after four or five months' trial he became so discouraged that he announced to plaintiffs his desire to discontinue the work. The plaintiffs, however, were anxious to have him continue his efforts, and urged him to do so, which he did, though he afterwards, on other occasions, expressed a desire to discontinue for the same reason, but was on these occasions again urged and induced by plaintiffs to continue. He procured some insurance, but not sufficient to enable him to pay his expenses out of his commissions upon the first year's premiums, including a fixed expense amount allowed him under his written contract of employment. The plaintiffs thereupon agreed to advance him from time to time whatever additional amounts he might need for expenses. He claims that he consented to this upon the understanding with the plaintiffs that all such advances should be payable only out of commissions accruing to him, and that in no event was he to be held personally

liable to repay such advances. All of the evidence upon this question was the testimony of Wainwright himself. No effort was made to contradict his testimony upon this subject. The intervener evidently relied upon its contention that such evidence was inadmissible. Wainwright's testimony relative to this arrangement is as follows:

"A. The conditions were such that we could not get any business and I went to Mr. Fleming after I had been there a few months and told him I did not care to continue under the conditions and there was no opportunity for me to make a living out of it under the original contract, and he stated that he wanted me to stay, that he would not hold me to the original contract, and that he would advance me, if I remembered correctly, $25 a week to live off of and pay my expenses, and he insisted upon my staying. Q. State whether that conversation—whether that was a single conversation or whether you had such conversation more than once? A. We had such conversation three or four different times. Q. And what was the burden of his request to you and promise to you on each conversation? A. That there would be nothing held up against me in regard to the advances in any way, shape or manner. Q. What, if anything, was the understanding with regard to the manner or conditions under which these advances were to be repaid? A. There was no agreement made between Mr. Fleming and I that that should ever be repaid to Allenberg & Fleming or to the Equitable Life Insurance Company. It was money they advanced to get out and do all I could in the interests of the Equitable Life Insurance Company, and if there was anything to gain by that they would gain, and if anything they would lose, they would lose. Their object was to keep as many men in the field as possible to keep up the appearance from the exposures that were being made through the magazines. Q. Possibly you do not grasp the exact purport of the question. Was there any understanding as to any manner in which Allenberg & Fleming were to be reimbursed, if at all? A. Through the premiums and renewals. Q. Explain what you mean by that? A. The percentage on the first year's payments and a renewal for 12 years afterwards on those premiums, as long as the policy was in force up to 12 years, if I remember correctly it always was run for 12 years. Q. That is the rate set forth in the contract? A.

Yes, sir, the rate set forth in the contract. Q. And those commissions that would be due to you on that account were to apply on these advances? A. On money advanced to me, yes, sir. . . . Q. Now I wish you would state just the circumstances under which you signed up these slips that we have in evidence here, just tell how you came to sign these papers? A. When I first talked with—was introduced to Mr. Fleming and went up to talk with him, and he told me what the contract was and so forth, and had one filled out. I took it home and read it. It was a week or two before I signed it and I accepted the contract and worked on it for a while and I saw that it was impossible to make good, and I was going to quit and he got me to remain with the positive understanding that there would be nothing charged up to me in any way, shape or manner. He said 'The only thing is we have to have a contract of this sort'— Q. You do not understand me, I say these slips here? A. I am going to get to that. And he said 'Whenever you need any money go to the cashier and get it and sign a receipt.' So whenever I needed any money or wanted any advances or anything I would notify the cashier and the cashier would hand it out to me with one of these slips through the window, and I just noticed the heading, received from Allenberg & W. M. Fleming or Allenberg & Fleming, and supposed that was nothing but a receipt, and I would sign them. I never read one of them in my life until this case was started. Q. Did you have any idea that you were signing anything that might be construed as an agreement on your part to absolutely repay these advances? A. No, sir. Q. State whether or not you ever had any intimation made to you or received any suggestions that there was any contention on the part of Allenberg & Fleming or anybody else on their behalf or representing them, or connected with them, that these slips which you signed and which are in evidence here were to be regarded as obligating you personally to repay these funds? A. Never was anything, I knew nothing of it. Other than they were said to be receipts. Q. Otherwise than out of commissions? A. Out of commissions and renewals, yes, sir. Q. When did you first learn that such a contention was made? That those were regarded by Allenberg & Fleming and by the life insurance society as absolute promises by you to repay? A. After this case started."

This action was commenced in April, 1909. The last of the receipts sued upon was signed in December, 1905, more than three years before the commencement of this action. Wainwright was arbitrarily discharged from his employment without any cause being assigned or shown, in January, 1906, before the expiration of his agreed term of employment. This, it will be noticed, was also over three years before the commencement of this action.

Passing, for the present, the question of the admissibility of this evidence, other than the receipts themselves, for the purpose of showing the real understanding of the parties as to the defendants' personal liability, we cannot escape the conclusion that in the advancing of these sums to Wainwright and the taking of the receipts from him in this manner it was not intended that the money should be repaid by him other than from commissions accruing to him upon the premiums falling due and collected upon insurance procured by him, and that it was not the intention of the parties to this arrangement to render him personally liable for such advances. His testimony clearly so indicates, and it was evidently upon this theory that the learned trial court so held. This conclusion, however, cannot prevail if the receipts upon their face are such as to render the defendants' personal liability certain, and there was no mistake in the execution of the receipts; for in that event the receipts cannot be varied by parol evidence. This brings us to the question, are these receipts so certain in their language as to exclude parol explanation?

The first form of receipt, it will be noticed, provides that the advances "shall constitute a lien upon and be paid from any and all first year's and renewal commissions and percentage allowance accruing to me," etc. This language seems to clearly provide for the repayment of the advances from a specific fund, and if it was not for the last provision in this form of receipt we would have little difficulty in deciding that no personal obligation was created by its terms. The last provision of the receipts provides for the payment of these

advances in cash "upon the termination of my contract arrangements." It might be argued that the termination of these contract arrangements meant at the end of twelve years when Wainwright's right to commissions would expire, assuming that some of the insurance procured remained alive that long; or that it meant the termination of his contract arrangements by his own voluntary act, or because of some act of his entitling the plaintiffs or the intervener to terminate all his rights under his employment contract. We have seen the employment was not terminated for such cause. Counsel for intervener seem to argue that this last provision means the termination of the employment contract regardless of the cause of such termination. We cannot give our assent to this latter contention, and do not think that the form of receipt upon its face is so clear and certain as to exclude oral evidence, such as was here offered, to show the real understanding of the parties as to the defendants' personal liability.

The second form of receipt does not state any specific time for repayment. The blank on that form for that purpose was left unfilled in each receipt. It is true that form provides, "I agree to repay in cash with interest," etc., but it also provides "said advance shall constitute a lien upon and be repaid from any and all first year's and renewal commissions and percentage allowance accruing to me," etc. It may well be argued that this constitutes an agreement to repay only from a specific fund. In any event, we think that a personal liability is not, by this form of receipt, so clearly fixed upon the defendants as to exclude the oral evidence admitted by the court to show the real understanding between the parties.

Some contention is made that the intervener stands in the position of an innocent holder of these receipts, and that therefore it is bound only by the language of the receipts. We are not inclined to look with favor upon this contention, in view of the relation existing between it and its general agents, the plaintiffs. While these receipts were given to the plaintiffs, we are of the opinion that the record shows that

the acceptance of them in the first instance was as much the act of the intervener as that of the plaintiffs. Indeed, the intervention seems to have been based upon that theory.

Under all the circumstances shown, we conclude that there was no personal liability created against the defendants by the signing of these receipts by Morton D. Wainwright. The judgment is affirmed.

DUNBAR, C. J., MOUNT, FULLERTON, and GOSE, JJ., concur.

[No. 9395. Department One. February 18, 1911.]

THE STATE OF WASHINGTON, *on the Relation of Mrs. Samuel E. Hanna, Plaintiff*, v. JOHN F. MAIN, *Judge, etc., et al., Respondents.*[1]

PROHIBITION—PARTIES ENTITLED—TAXPAYERS—OBJECTION TO GRAND JURY. A taxpayer is not a "person beneficially interested" within Rem. & Bal. Code, § 1028, and prohibition does not lie on his application to restrain the superior court from summoning a grand jury because of alleged error in the drawing.

Application for a writ of prohibition filed in the supreme court February 17, 1911, to restrain the superior court for King county, Main, J., from summoning and empaneling a grand jury. Denied.

John H. Perry and *R. W. Prigmore*, for relator.

John F. Murphy and *Hugh W. Caldwell*, for respondents.

GOSE, J.—This is an application for an alternative writ of prohibition. The petition alleges, that the relator is a taxpayer in King county; that the respondent John F. Main, as judge of the superior court of that county, on the 14th day of February of this year, ordered a panel of grand jurors to be drawn from the jury list of that county; that eighty names

[1]Reported in 113 Pac. 632.

were so drawn by the clerk of the court; that the respondent sheriff was ordered to summon the persons drawn to appear in court on the morning of February 17, to be empaneled and instructed as a grand jury; that the order is illegal, and that unless the writ issues, the taxpayers of the county will be required to defray the expenses of that body. The relator prays that the summoning and empaneling of the jury be prohibited. The respondents have demurred to the petition upon the ground that the facts stated do not entitle the relator to any relief.

The relator relies upon Laws of 1909, p. 133, §§ 4 and 5 (Rem. & Bal. Code, §§ 103, 104). By § 4 (Id. § 103), it is provided that the names of the petit jurors shall be drawn on the second Saturday of the month, to serve for the ensuing month. Section 5 (Id., § 104), provides that, "the names of persons to serve as grand jurors shall be drawn from the jury list as hereinbefore provided." The record discloses that the names of the grand jurors were not drawn on the second Saturday of the month. The relator contends that the words of § 5, "as hereinbefore provided," mean that the grand jurors shall be drawn on the second Saturday of the month, and that, if not so drawn, the act of drawing becomes a nullity, and that any official act of the grand jury would be illegal. The respondents argue that the time of drawing is not of the substance of the law, but only directory.

Our code, Rem. & Bal. Code, § 1028, provides that the writ shall issue in proper cases "on the application of the person beneficially interested." While the point is not made by the respondents, we do not think the relator is beneficially interested within the meaning of the law. We have heretofore, in cases of this character, passed this question without consideration, because it was not suggested by the parties to the record. *State ex rel. Gibson v. Gilliam*, 56 Wash. 29, 104 Pac. 1131.

The practice of considering applications for writs of prohibition at the instance of a taxpayer only, to stay judicial

proceedings, will no longer be tolerated in this court. The orderly procedure in the administration of justice cannot be frustrated or suspended in such manner. If the relator may have a hearing as a taxpayer for alleged error in the drawing of a grand jury, it is obvious that he can, with equal propriety, apply for a writ to stay the hand of the court for every prejudicial error committed in the trial of a criminal case. There is no difference in principle between this case and one where error is alleged in the drawing or empaneling of a petit jury for the trial of criminal cases. Nor does it differ in principle from a case where error is alleged in overruling a demurrer to an information charging the commission of a felony. It is obvious that, if the right of a taxpayer to apply for a writ of prohibition against a judicial act is once conceded, the principle could be indefinitely extended and the practice would become intolerable.

Applications of this kind are not to be confounded with those where a taxpayer seeks to enjoin the commission of some illegal act of a municipal corporation or its officers. Such cases rest upon entirely different principles.

The writ is denied.

Dunbar, C. J., Fullerton, Mount, and Parker, JJ., concur.

[No. 9079. Department One. February 20, 1911.]

THE STATE OF WASHINGTON, *Respondent*, v. CHARLES E. RAY, *Appellant*.[1]

INTOXICATING LIQUORS—SALE WITHOUT LICENSE—STATUTES—REPEAL—CONSTRUCTION. The sale of intoxicating liquors outside of the corporate limits of a city or town, without any license from the county commissioners, is punishable as a misdemeanor, under Rem. & Bal. Code, § 6263, giving the board of county commissioners in each county the sole and exclusive authority to regulate, license, or prohibit such sales, and Id., § 2673, providing that the doing of any act without a license, when one is required by law, shall be a misdemeanor; notwithstanding that Bal. Code, § 7312, making it a misdemeanor to sell intoxicating liquors without a license was repealed by Rem. & Bal. Code, § 2304.

Appeal from a judgment of the superior court for Whitman county, Canfield, J., entered April 14, 1910, upon a trial and conviction of selling intoxicating liquors without a license. Affirmed.

J. T. Brown, for appellant.

Charles L. Chamberlin (Paul Pattison, of counsel), for respondent.

GOSE, J.—The appellant was tried, convicted, and sentenced upon a charge of selling intoxicating liquors without a license, in the county of Whitman, on the 25th day of December, 1909. This appeal followed.

The evidence showed that the liquor was sold at a place called Lewiston Junction, in that county, outside the corporate limits of any city or town. Bal. Code, § 7312, provided that any person who shall sell or dispose of intoxicating liquors without having first obtained a license from the proper authorities shall be deemed guilty of a misdemeanor. This section was repealed by Laws 1909, p. 906, § 52 (Rem. & Bal. Code, § 2304).

[1]Reported in 113 Pac. 634.

The appellant contends that, since the repeal of that section, there is no law in this state making it a crime or an offense to sell or dispose of intoxicating liquors without having first obtained a license from the proper authorities. The point was raised by a demurrer to the information and by a motion in arrest of judgment. We do not think the contention can be upheld. The applicable provisions of the statute are as follows: It is provided in Rem. & Bal. Code, §6263, that,

"The board of county commissioners of each county in the state of Washington shall have the sole and exclusive authority and power to regulate, restrain, license, or prohibit the sale or disposal of spirituous, fermented, malt, or other intoxicating liquors outside of the corporate limits of each incorporated city, incorporated town, or incorporated village in their respective counties."

And by § 6268:

"Nothing in this act shall be held or construed to allow any person, firm, or corporation to barter, sell, or otherwise dispose of any spirituous, malt, fermented, or other intoxicating liquors without having first obtained a license therefor, as required by the provisions of this chapter, except as provided in § 6275, *infra*."

Section 6275 has reference to pharmacists or druggists, and no right or immunity is claimed under that section. These sections of the statute are taken from the Laws of 1888, pages 124-5. The title of that act is: "An Act to regulate, restrain, license or prohibit the sale of intoxicating liquors." Laws 1909, p. 1024, § 421 (Rem. & Bal. Code, § 2673), provides:

"Every person who shall in any case not otherwise specially provided for, do any act, for the doing of which a license or other authority is required by law, without having such license or other authority as required by law, shall be guilty of a misdemeanor."

Laws 1909, p. 894, § 14 (Rem. & Bal. Code, § 2266), provides the punishment for a misdemeanor where the penalty is

not fixed by other provisions of the law. A reading of these several provisions makes it clear that the law making body not only intended to, but did, make it a misdemeanor for any person to sell or dispose of intoxicating liquors without having first obtained a license from the proper authorities. Any other construction would render these sections of the law meaningless. Discussion cannot clarify them, and we will not nullify them by a strained construction. This view is supported by *State v. Krook*, 58 Wash. 23, 107 Pac. 1032.

The judgment is affirmed.

DUNBAR, C. J., MOUNT, PARKER, and FULLERTON, JJ., concur.

[No. 9109. Department One. February 20, 1911.]

ALBERT HANSEN, *Appellant*, v. E. J. ROUNDS *et al.*, *Respondents*.[1]

MASTER AND SERVANT—INJURY TO SERVANT—PLEADING—COMPLAINT—SUFFICIENCY—CONTRIBUTORY NEGLIGENCE. A complaint states a cause of action where it alleges that one employed as a common laborer was ordered to go under and lift on the end of a heavy derrick, and upon his doing so, his employers negligently caused the same to fall upon and injure him; contributory negligence being a matter of defense, and the allegations in no way implicating the plaintiff.

Appeal from a judgment of the superior court for King county, Gay, J., entered March 11, 1910, upon sustaining a demurrer to the complaint, dismissing an action for personal injuries. Reversed.

Parker & Brown, for appellant.

Murphy & Winders, for respondents.

FULLERTON, J.—The appellant brought this action to recover for personal injuries. A general demurrer was interposed and sustained to his complaint, and on his electing to

[1]Reported in 113 Pac. 633.

stand thereon and refusing to plead further, his action was dismissed with costs. The ultimate question for decision therefore is, does the complaint state facts sufficient to constitute a cause of action.

The allegations of the complaint are as follows:

"(1) That the plaintiff was employed by the defendants as a laborer, to perform labor in and about the construction of a certain building, situated at the southwest corner of Pike street and Minor avenue in the city of Seattle, and that the duties of his said employment required him to do whatever he was ordered to do by the said defendants.

"(2) That on the 28th day of May, 1909, at the place aforesaid, the defendants were using in the construction of said building a certain heavy derrick, which said derrick was then and there resting upon or across a certain truck, one end of said derrick being then and there upon the ground and the other end of said derrick being elevated above the head of the plaintiff.

"(3) That on the day and year aforesaid, at the place aforesaid, the defendants ordered and directed the plaintiff to go under the upper end or part of said derrick, which said upper part being above the head of the plaintiff as aforesaid, and to reach upward with his arms and to lift and push upward said derrick, which said derrick being then and there of great weight to wit: of greater weight than the plaintiff could lift and hold up, and this being then and there well known to the defendants, so that the weight and pressure of said derrick upon said truck would be lessened and relieved to such an extent that the defendants could move said truck a few inches while said derrick would continue to be supported and prevented from falling upon the plaintiff by said trucks, and the plaintiff in pursuance of said order and direction of the defendants then and there went under the upper part of said derrick and reached upward with his arms and lifted and pushed upward against said derrick with all his might and strength, and the said defendant, then and there, while the plaintiff was so pushing and lifting, wrongfully, negligently and unlawfully seized hold of said trucks, and by a sudden jerk, quickly removed said truck from under said derrick, and thereby threw the whole weight of the derrick upon the plaintiff, and the plaintiff was, by reason of the great weight

of the said derrick, crushed to the ground, with great force and violence, and the said heavy derrick then and there fell upon him with great force, and he was thereby severely injured, and divers bones of his body were broken to wit: the bones of his left shoulder were broken, and the muscles and tendons of his left arm were lacerated and torn, and his right shoulder was injured, and the muscles of right arm were torn apart and broken and injured, and the right side of his face and head were bruised, and he sustained a severe shock to his nervous system, and his usual strength and vigor has been impaired, and he is thereby permanently injured, and he became and was sick, sore, lame, disordered and disabled, and so remained for a long space of time, to wit: from thence hitherto, during all of which time, he suffered great pain, and was compelled to, and did, lay out large sums of money in endeavoring to be healed of his said injuries, and was prevented from attending to his usual affairs and business, and has sustained damages in the sum of $5,000."

It seems to us manifest that this complaint states a cause of action. In substance it is alleged that the appellant, who was an employee of the respondents, was directed by the respondents to assist them in moving a derrick of great weight; that he took the position assigned him and performed his part of the work according to his instruction, and that the respondents so negligently performed their part of the work as to cause the derrick to fall upon him to his injury. Since in this state contributory negligence on the part of the servant is a defense and does not have to be negatived in the complaint, it seems clear that there is in this complaint sufficient to put the respondents upon their defense. In support of the ruling of the court below, the respondents' learned counsel have filed an able and ingenious brief, in which they argue that the complaint does show, when taken with its necessary inferences, that the appellant was guilty of contributory negligence. But without following the argument in detail, we cannot accept this view of the pleading. It seems to us that it clearly imputes the fault causing the injury to the respondents without implicating appellant there-

in in any manner. The judgment is reversed, and the cause remanded with instructions to overrule the demurrer and require the defendants to answer over.

GOSE, MOUNT, and PARKER, JJ., concur.

[No. 9120. Department One. February 20, 1911.]

S. A. KEENAN, *Respondent*, v. EMPIRE STATE SURETY COMPANY, *Appellant*, FRANK ARMSTRONG *et al.*, *Defendants*.[1]

PRINCIPAL AND SURETY—DISCHARGE OF SURETY—MODIFICATION OF CONTRACT—WAIVER. A surety company guaranteeing the performance of building contract waives a provision that the owner shall retain fifteen per cent of payments due for labor etc. until after completion of the contract, where, with the knowledge and cooperation of the agent to whom the company referred the matter, the contract was modified and the owner authorized to pay obligations as they accrued.

PRINCIPAL AND AGENT—AUTHORITY OF AGENT. A surety company having in writing notified the obligee that the adjustment of the principal's default had been referred to a particular agent, it is within the scope of the agent's powers, in the absence of any express limitation, to waive performance of the terms of the bond.

PRINCIPAL AND SURETY—DISCHARGE OF SURETY—AGREEMENTS. An agreement between a surety company and the obligee on the bond that a certain person should act as an arbiter between them is not void by reason of the fact that such person was a debtor of the obligee, there being no showing that he did not act disinterestedly.

Appeal from a judgment of the superior court for King county, Gay, J., entered June 25, 1910, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on an indemnity bond. Affirmed.

F. C. Kapp, for appellant.

H. A. P. Myers and *Keenan & Hardinger*, for respondent.

[1]Reported in 113 Pac. 636.

FULLERTON, J.—On January 19, 1909, the respondent entered into a contract with the defendants, Frank Armstrong and Fred E. Enevoldsen, whereby they undertook to furnish all the necessary labor and material and construct an apartment house on a certain described lot for a consideration of $13,500, "less two hundred dollars ($200) reserved for the payment of hardware for said building." The contract was in writing, and was on the form adopted and recommended for general use by the American Institute of Architects and the National Association of Builders, and contained, among others, a provision to the effect that should the contractors at any time refuse or neglect to supply a sufficiency of properly skilled workmen, or materials of proper quality, or fail in any respect to perform the work with promptness and diligence, and such refusal, neglect or failure be certified by the architects, the owner, after three days' notice to the contractors, should be at liberty to perform the same and deduct the cost thereof from any money then due, or thereafter to become due to the contractors under the contract. It also provided that, should the architects certify that there was sufficient ground for such action, the owner should be at liberty to terminate the contract, enter upon and take possession of the building, and complete the work according to the contract, at his own expense, and account to the contractors only for such balance as might remain after deducting the cost of the completion of the building from the unpaid balance of the contract price.

At the time of the execution of the contract, the contractor executed a bond to the respondent with the appellant Empire State Surety Company as surety, conditioned for the faithful performance of the contract. The bond contained further stipulations to the effect that the owner should give notice to it at its office in New York city of any default on the part of the contractors in the performance of any of the conditions of the contract within fifteen days after the default occurs, and should retain not less than fifteen per centum of

all payments for work performed and materials furnished in the performance of the contract until the complete performance by the contractors of all the conditions of the contract on their part to be performed, and until the expiration of the time in which liens can be filed, and until the cancellation and discharge of liens if any are filed.

The contractors entered upon the performance of the contract immediately after its execution, and during the first month thereof performed labor upon, and furnished material for, the construction of the building which entitled them, according to the architects' estimate, to the sum of $660. This sum was paid them by the owners, and the work was continued for another monthly period. At the end of that time, the contractors informed the owner that they were unable to meet the expense incurred for labor and material during the preceding month, as required by the contract, and consequently could not obtain the architects' certificate which authorized the second monthly payment to them by the owner, and requested the owner to make payments directly to the laborers and materialmen, at the same time confessing their inability to proceed further with the contract according to its conditions. The owner thereupon procured from the architects a certificate to the effect that the contract had been violated by the contractors, setting out the particulars, and that the respondent was authorized and empowered to take possession of the work and complete it himself. A notice was immediately sent to the surety company notifying them of the default on the part of the contractors, together with a copy of the architects' certificate, accompanied by a demand that it take upon itself the completion of the work. A letter was sent the owner by the surety company acknowledging the receipt of the notice, and stating that the matter had been taken up with their local agent, who had been instructed to give it attention and report. The owner thereupon called on the local agent named in the letter, and was informed that a Mr. Eldredge would call upon him. Mr. Eldredge called as

stated, and an arrangement was made whereby the contractors left the construction of the building in the charge of a Mr. Burgess, the then acting superintendent for the contractors, who undertook to superintend the final construction of the building on behalf of the contractors, the owner agreeing to meet the bills for such labor and materials as should be necessary to complete the work. The consent of the contractors to this arrangement was put in writing, this being procured from the contractors by the agent of the surety company. The building was completed according to this arrangement, at an expense to the owner of $20,507.87.

In the final estimate made by the architects it was found that $2,078.31 of this sum had been paid for labor and materials not contemplated in the original plans, although permitted by the contract, and that certain deductions had been made from the original plans, making a saving in the cost of the building of $460, leaving a net excess in the cost of the building over and above the contract price of $5,589.56. The contract called for the completion of the building on April 20, 1909. It was in fact completed on July 10, 1909, and for this delay the owner claimed the sum of $700. Demands for these sums were made upon the surety company, but the company denied liability, and the present action was begun to recover the amount thereof. Judgment went for the owner, and the appeal was taken therefrom by the surety company.

The principal contention urged for reversal is that there was a breach of the condition of the bond. It is claimed that the owner did not retain fifteen per centum of all payments becoming due for labor performed or materials furnished until after the completion of the work by the contractors. But notwithstanding its strenuous contention to the contrary, it is clear that this condition of the bond was waived by the surety. It will be remembered that the contractors, at the end of the second month, announced their inability to perform the contract according to its terms, and their requirement of

financial assistance if the building was to be completed at all; that this condition of their affairs was made known to the surety company by the owner, and that the surety company referred the matter to their agents, who took the matter up with the owner with the result that the owner agreed to so far modify the contract as to pay the obligations incurred in the construction of the building as they matured. Since this was done with the knowledge and co-operation of the surety company's representative, it is enough to show an implied assent thereto on the part of the surety company, although it may be that there is no evidence in the record of an express assent on the part of the surety company or its representative to a modification of the contract.

It is argued also in this connection that there is no proof in the record that the surety company ever authorized its representative to waive any of the conditions of the bond, but as to this it is enough to say that the company stated, in writing to the owner in answer to his notification, that it had referred the matter to the particular agent, without stating that any limitations had been put upon his powers. A general agent's powers, in the absence of express limitations, is limited only by the scope of his agency, and here it was well within the scope of the agent's powers to waive the performance of the provisions of the bond thought to have been breached.

It appears that, in the settlement by which the owner agreed to advance the costs necessary to complete the building, it was first made a condition thereof that a certain payment should be made by the person left in charge by the contractors, to the owner, the agreement being evidenced by a writing stating its terms, and a promissory note. The surety company claims that this agreement operated to relieve it from liability, on the principle that the maker of the note thereby became the debtor of the owner, and was not, for that reason, at all times free to represent his principal. But the contention is not tenable. It is not a general equitable principle that a debtor cannot be presumed to act disinterestedly be-

tween his creditor and another when he is placed in the position of arbiter between. To avoid liability on its obligation in this instance, therefore, the surety company would have to show something more than the mere fact; it would at least have to show that the arbiter did not act disinterestedly, and that his acts resulted to its prejudice. There was no such showing here.

At the trial the appellant offered to show that certain of the extras put into the building cost more than the architects allowed for them, and it is contended here that the court, on the objection of the respondent, refused to admit the evidence. The record upon this question is somewhat confusing, but, as we read it, the court did not exclude any competent evidence offered upon the question. He permitted a witness to testify that a certain garbage chute, for which the architects allowed an extra of forty dollars, would cost to put in at least one hundred and forty dollars. It also permitted a witness who had examined the buildings and plans to testify that a certain statement which the witness presented, and which was admitted in evidence, contained the result of his examination. True, certain offers of proof were rejected, but these seem to us to be too indefinite on which to base a claim of error. We are unable to find, therefore, that the court rejected any competent proofs offered by the appellant. The value of the extras furnished was the only part of the respondent's case affecting the amount of the recovery that the appellant sought to controvert. On the value of these its witness who furnished the complete estimate differed but little more than one dollar from the estimates put thereon by the architects. If we were to accept as true the estimates of the witness who testified to the cost of the garbage chute, the difference would be but one hundred dollars; but we think the latter's chances for observation were not better than the architects or the other witness called by the appellant, and we prefer to take their evidence as to these values than the evidence of the witness who differed from them.

These views of the case require an affirmance of the judgment, and it will be so ordered.

GOSE, MOUNT, and PARKER, JJ., concur.

[No. 9242. Department Two. February 20, 1911.]

FRANK S. ETHERIDGE, *Respondent*, v. GORDON CONSTRUCTION COMPANY *et al.*, *Appellants*.[1]

MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE—ASSUMPTION OF RISKS—QUESTION FOR JURY. Whether a workman, engaged in taking down a building, was guilty of contributory negligence or assumed the risks in removing a purlin supporting the trusses, is for the jury, where there was evidence that he did so upon the order of the general foreman who was following the general plan adopted by the master, although he had been warned the day before by another workman or foreman that it was extremely dangerous to remove the purlin.

MASTER AND SERVANT—SAFE PLACE. In the taking down of an exhibition building with a view of preserving its parts to be again erected for use, the master owes the duty of furnishing a "safe place" in which to work.

SAME—FELLOW SERVANTS. A general foreman in the work of taking down a building who ordered the removal of a purlin is not a fellow servant of a workman carrying out the order.

SAME—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS. Upon an issue as to contributory negligence of a workman engaged in taking down a building, after warning by a fellow workman of the dangerous nature of plaintiff's act, an instruction that there could be no recovery if he was warned by a fellow servant having greater experience than the plaintiff, is as favorable as defendants can ask.

WITNESSES—CREDIBILITY. In an action for personal injuries, it is not error to allow witnesses who were hurt in the same accident to state whether they had been paid money in settlement of their claims, where the jury were instructed that it was relevant only as touching their interest in the case and the weight to be given their testimony.

Appeal from a judgment of the superior court for King county, Gay, J., entered July 1, 1910, upon the verdict of a

[1]Reported in 113 Pac. 639.

jury rendered in favor of the plaintiff, in an action for personal injuries sustained by an employee engaged in tearing down a building. Affirmed.

Kerr & McCord, for appellants.

Frank E. Green, for respondent.

MORRIS, J.—Appeal from a judgment awarding respondent damages for personal injuries sustained while in the employ of appellants. On November 16, 1909, appellants were engaged in taking down the Monitor & Merrimac building, upon the grounds of the A.-Y.-P. Exposition at Seattle. The building was not being wrecked or demolished, but was being taken apart for the purpose of shipping its constructive parts to Denver, to be there again assembled and erected. On the morning of the injury, respondent was directed by one Perry, the general foreman, to assist a fellow workman named Evarts in removing one of the purlins which supported and braced the trusses. The purlin was taken down and dropped to the ground, and Perry then directed respondent to climb out on one of the trusses and remove a drift bolt, and while he was preparing to do so, and in a few minutes after removing the purlin, the columns supporting the truss swayed and the building collapsed and fell to the ground, carrying respondent with it, and inflicting the injuries complained of.

Appellants contend that the removal of the purlin was the direct cause of the collapse of the structure, while it is the contention of respondent that the structure fell because of insufficient bracing. So far as our review of the case is concerned, it is immaterial which theory be the true one, since there was evidence sufficient to support the verdict upon either theory. It appears that the previous afternoon respondent and Evarts were attempting to loosen one of the purlins, when they were told by a workman named Crowe that it was extremely dangerous to do so, and that they were in effect committing suicide, whereupon they desisted. There is much dispute in

the evidence as to Crowe's place on the job, appellants calling him a foreman, while respondent's contention is that he was only a fellow workman. However that may be, the evidence justifies the finding that Evarts and respondent were directed on the morning of the injury to take down this purlin, and that they removed it under orders from Perry, the general foreman, who, in ordering them to do so, was following out the general plan adopted by appellants in the doing of the work. Perry denies that he gave orders to remove this purlin, but we cannot say from the testimony that the jury were not justified in finding, as contended by respondent, that he did; and if they did so believe, then it was for the jury to say, admitting the warning given by Crowe the previous day, whether in acting in obedience to such orders by Perry, Evarts and respondent were doing an act so hazardous and dangerous as to preclude a recovery. *Withiam v. Tenino Stone Quarries*, 48 Wash. 127, 92 Pac. 900. This disposes of the defense of contributory negligence and assumption of risk as questions of law, and of the error asserted by appellants in failing to grant judgment notwithstanding verdict.

The remaining assignments go to instructions given, and the refusal of the court to give others offered by appellants. The first line of instructions objected to are those in which the court referred to the rule of "a reasonably safe place," as applied to the work in question. In this connection it must be borne in mind that appellants were not wrecking the structure, but were taking it down with some degree of care, with the view of preserving its timbers and parts from unnecessary injury, in order that it might again be erected with the use of the same parts. This being the case, the doctrine of "reasonably safe place" we think applied to the situation, and was correctly announced by the court as the law of the case; especially in view of the language of this court in *Liedke v. Moran Bros. Co.*, 43 Wash. 428, 86 Pac. 646, 117 Am. St. 1058, wherein it was said:

"If it is a master's duty to furnish the servant a safe place

in which to work, it is just as much his duty to furnish that safe place where the work to be performed is the demolition or tearing down of a building, as where it is its construction in the first instance."

This also disposes of the error based upon the court's refusal to give those instructions in which it was asserted that the doctrine of "a reasonably safe place" had no application to this case.

Another instruction refused was to the effect that Evarts and Perry were fellow servants of respondent, and there could be no recovery for their negligence. Under the evidence the court would not have been justified in holding, as a matter of law, that Perry was a fellow servant. As to Evarts, the jury were told that there could be no recovery if the injury was caused by the fault of a fellow servant. Other instructions refused were as to the loosening of the purlin, in view of the warning given by Crowe. Upon this phase of the case, the jury were told that, if respondent had been informed by one known to him to have had greater experience than himself that it was dangerous and suicidal to do as they were doing, and notwithstanding such warning proceeded to do the work in the condemned manner, and the building fell because of such method of doing the work, respondent would assume the risk and be guilty of contributory negligence and could not recover. This, we think, was as favorable an instruction as appellants were entitled to upon this point, and there was no error in refusing the one offered by them.

Complaint is also made of two instructions taken from *Liedke v. Moran Bros. Co., supra.* For the reasons there given, these instructions were a proper statement of the law and applicable to the facts involved. Other instructions complained of told the jury that appellants' duty was to adopt a reasonably safe plan, and to use ordinarily reasonable precaution consistent with the nature of the work to support the remaining portion of the structure from sudden collapse; and if they found the structure fell because of a defective plan, or

that the one adopted and carried out by appellants was unnecessarily dangerous, they would be liable. We see no fault in these instructions. They correctly stated the law, and are supported by *Ball v. Megrath*, 43 Wash. 107, 86 Pac. 382.

Another error complained of was in permitting Evarts and Crowe, who were injured in the same accident, to be asked if they had not been paid money in settlement of their claims of injury. This was permitted by the court upon the theory that it was relevant as touching their interest in the case and the weight to be given their testimony by the jury; and the jury were expressly cautioned to receive such testimony for no other purpose. As thus confined, we see no error in its admission.

Finding no error, the judgment is affirmed.

DUNBAR, C. J., CHADWICK, and CROW, JJ., concur.

[No. 9221. Department Two. February 21, 1911.]

JAMES OLDFIELD, *Respondent*, v. ANGELES BREWING & MALTING COMPANY, *Appellant*.[1]

LANDLORD AND TENANT—CONTRACT TO LEASE—BREACH—MEASURE OF DAMAGES. Where plaintiff erected a building under an agreement with defendant to lease the same for a period of five years, and defendant refused to take possession because of a statute passed subsequently preventing its use for saloon purposes, the breach of contract is actionable, regardless of whether or not the relation of landlord and tenant was created; and the measure of damages is the difference between the rental value during the term and the rent specified in the contract.

Appeal from a judgment of the superior court for King county, Albertson, J., entered July 19, 1910, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on contract. Reversed.

[1]Reported in 113 Pac. 630.

O. L. Willett, for appellant.

Chas. F. Munday and *Walter S. Fulton*, for respondent.

Morris, J.—The facts upon which this appeal is based are these: On September 24, 1908, the parties hereto entered into a written agreement, whereby respondent agreed to erect a building upon certain described property then owned by him in the city of Seattle, and to lease the same to appellant for a term of five years, commencing upon the day of the completion of the building, at a monthly rental of $350, payable in advance. The agreement was in the form of a lease, and the appellant entered into the usual covenants of a lessee. The respondent thereupon commenced the erection of the building, and the same was completed and ready for occupancy April 1, 1909, and notice of such completion and readiness was given appellant. It appears from the record that appellant desired to occupy the building, or the ground floor thereof, as a saloon, but was unable to do so because of chapter 134, § 62, of the Laws of 1909, page 466 (Rem. & Bal. Code, § 7229), passed subsequently to the making of the contract, prohibiting the sale of intoxicating liquors within three hundred feet of any state armory, the location in controversy being within that distance from the armory at Seattle. Appellant thereupon sought some modification of the contract, but being unable to obtain any, notified respondent of its refusal to take possession. Mr. Munday, attorney for respondent, thereupon wrote appellant as follows:

"Seattle, Wash., April 15, 1909.

"Angeles Brewing & Malting Co.,

"2030 Western Ave., City:

"Dear Sirs:—On behalf of Mr. Oldfield, I beg to notify you that Mr. Oldfield insists that you are liable to him for rent of the building, which he constructed for you under the lease to you. Inasmuch as you have, through your attorneys, Willett & Willett, announced that you shall refuse to take possession of the property, Mr. Oldfield will now proceed to lease the property at the best terms obtainable, and will hold

you for the loss which he will sustain by reason of your refusing to enter into possession and pay the rent. This will include the entire rent for the period that the premises may remain vacant subsequent to April 1, 1909, plus the difference between the rent you agreed to pay and the rent which Mr. Oldfield may be able to obtain for the remainder of the term. As soon as we have ascertained what this will be, we will notify you. Yours truly, Chas. F. Munday."

Nothing further seems to have been done, and no further communication passed between the parties, except that in May, Mr. Oldfield and Mr. Jenecke, manager of appellant, sought to arrive at an amicable adjustment of the matter, but were unable to do so. In February, 1910, respondent commenced this action, in which he sought to recover the fixed rent of the building at $350 a month from April 1, 1909, and upon the trial was awarded such sum from April 1, 1909, to July 1, 1910, the time of trial; from which judgment defendant appeals.

Many errors are suggested by appellant, and there is much discussion in the briefs as to whether the contract sued upon was a lease or an agreement for a lease, or whether, since appellant never took possession, the relation of landlord and tenant ever existed and there could be a recovery for rent as rent. To our minds these questions are immaterial, and have no bearing upon the real issue between the parties, and any discussion of them would be merely academic in its character. The parties hereto entered into a contract whereby each was bound to the performance of certain conditions. Whatever be the technical legal name of that contract, or the correct definition of the relation the parties assumed and bore to each other under their agreement, it was nevertheless their bounden contract, and for its breach an action will lie. The only matter necessary to be inquired into, since the appellant admits its refusal to comply with its agreement to take possession of the building upon its completion, is, Is such a refusal actionable, and if so, what is the true measure of damages?

That such a breach is actionable is to us self-evident, since no reason suggests itself why the contract is void.

Appellant argues that it is not a lease, since it conveys no interest in real property, but provides only for the occupancy of a building not yet in existence. We know of no reason in law why parties may not contract for the use and occupancy of a building to be erected thereafter, and why, upon failure of either party to perform, an action will not lie. In some of the cases where such situations are discussed, reference is made to the contract as one of lease, and the parties are referred to as lessor and lessee; in others, it is said to be an agreement for a lease, to take effect upon the completion of the building; while in others there is no attempt made to define the nature and character of the contract, reference being made only to the conditions of performance, the breach, and the measure of damages. Still others deny the relation of landlord and tenant, inasmuch as there was no occupancy; and for this reason do not permit a recovery of rent. But none of the cases, so far as we are able to discover, deny the right of action to either party upon the breach, and while they differ some as to the true measure of damages, the great weight of authority is to the effect that the true measure of damages, for failure to take possession, is the difference between the amount stipulated in the contract and the sum for which the premises would rent to other parties during the stipulated term, and in this connection the rule is the same as in leases or agreements to lease. 24 Cyc. 923. Irrespective of whether the breach be by the lessor or lessee—and in using the words "lessor and lessee" we do so for convenience of reference—it is difficult to see why this should not be the true measure of damages, since the damage to either party to the contract is the same—the loss of use and occupancy, which is the value feature of the contract to both parties; and what better way can there be to determine that loss than to take the difference between the amount fixed in the contract and the rental value of the premises for the given time? There is

but one breach, and there should be but one recovery for that breach. *Sloan v. Hart*, 150 N. C. 269, 63 S. E. 1037, 21 L. R. A. (N. S.) 239; *Favar v. Riverview Park*, 144 Ill. App. 86. To the above measure of damage should be added such special damages as the lessee may plead and prove to have necessarily resulted to him from the breach of the agreement. *Cohn v. Norton*, 57 Conn. 480, 18 Atl. 595, 5 L. R. A. 572; *Herpolsheimer v. Christopher* (Neb.), 111 N. W. 359, 9 L. R. A. (N. S.) 1127.

In *James v. Kibler's Adm'r*, 94 Va. 165, 26 S. E. 417, the lessee refused to take possession, and the court, while denying that the relation of landlord and tenant existed, there being no change of possession, gives the measure of recovery as:

"In such a case the plaintiff is not entitled to recover for rent of the premises, but he has compensation for the injury sustained in consequence of the breach of the contract, and his measure of damage is the difference between that which he was to receive under the violated contract, and that which he does receive from the purchaser of the lease;"

the lease in that case having been sold at public auction after due advertisement and notice. Similar rulings are to be found in *Post v. Davis*, 7 Kan. App. 217, 52 Pac. 903; *Dulin v. Knechtal* (Tex. Civ. App.), 51 S. W. 350, and *Shubert v. Sonheim*, 123 N. Y. Supp. 529.

In *Massie & Rather v. State Nat. Bank of Vernon*, 11 Tex. Civ. App. 280, 32 S. W. 797, the plaintiff, under an oral agreement that defendants would rent the same for a period of five years, erected a brick building. When the building was completed, defendants refused to occupy it, and plaintiff leased the building for the term and then brought suit. The court, in discussing the case, says:

"The plaintiff in this case was entitled to recover, not, indeed, for rent of the premises after the abandonment of them by the defendants, but for compensation for the injury done him; and the proper measure of his damage is set out in the account upon which he sues; that is, the difference between the rent he was to receive and the rent he did receive, if that

were the utmost for which, by the exercise of ordinary diligence, the premises could be rented. . . . It is well settled that for a breach by the lessor of the covenant for quiet enjoyment, the lessee can recover as damages the difference between the value of his lease and the stipulated rent (*Buck v. Morrow*, 2 Tex. Civ. App. 361, 21 S. W. 398); and no satisfactory reason can be given why the same rule should not be applied in favor of the lessor against the lessee."

So in *Cleveland v. Bryant*, 16 S. C. 634, plaintiffs agreed to erect a building, which defendant agreed to rent so long as he was postmaster. The building was completed and tendered to defendant, who refused to accept or occupy it. Action was brought, and it was held that the right of action arose immediately upon defendant's refusal to take the building, and that the measure of damage was the difference between the rental value for the three years defendant remained postmaster, and the amount fixed as rent in the contract.

Other similar cases might be cited, but the above are sufficient to indicate what to our mind is the better rule. When, therefore, appellant refused to take possession of the building erected by respondent under their contract, a cause of action immediately arose, and the measure of damages was not the rent reserved in the contract, as held by the trial court, but the difference between that sum and the rental value of the premises for the five years fixed in the agreement. This seems to have been the view taken by counsel for respondent when he wrote his letter of April 15, and we think the true rule.

For this error in the judgment, the same is reversed.

Dunbar, C. J., Crow, and Chadwick, JJ., concur.

[No. 8935. Department One. February 28, 1911.]

THE STATE OF WASHINGTON, *on the Relation of the Olympia National Bank, Plaintiff*, v. JOHN G. LEWIS, *State Treasurer, Respondent.*[1]

STATES—WARRANTS—NEGOTIABILITY—INNOCENT HOLDERS. A state warrant issued in payment of fraudulent claims based upon false and forged vouchers is void, even in the hands of an innocent holder, since a state warrant is not negotiable in the sense of excluding inquiry into the legality of its issue or defenses thereto.

STATES—WARRANTS—AUDITING OF CLAIMS—ESTOPPEL. The fact that false claims against the state were audited and allowed by the board of military auditors, under Rem. & Bal. Code §§ 7222 and 7223, does not preclude defenses to warrants thereon in the hands of an innocent holder, there being nothing in such sections to indicate an intent to make the warrants negotiable.

STATES—STATE OFFICERS—TREASURER. It is the duty of the state treasurer to refuse payment of warrants illegally issued upon fraudulent claims.

MANDAMUS—STATE WARRANTS—PARTIAL VALIDITY—RELIEF. Upon mandamus to compel payment of a state warrant on claims part of which were illegal, the supreme court will not direct payment to the extent of the valid claims, the state treasurer not having refused to honor a proper warrant therefor.

Application filed in the supreme court July 13, 1910, for a writ of mandate to compel the state treasurer to pay a warrant issued upon the military fund. Denied.

George C. Israel, for relator.

The Attorney General, for respondent.

PARKER, J.—This is an original application in this court for a writ of mandate to compel the state treasurer to pay a warrant for the sum of $1,713.58, issued by the state auditor upon claims which had been audited and approved by the board of military auditors. After return and answer by the treasurer, the parties, by their counsel, filed a stipulation

[1]Reported in 113 Pac. 629.

agreeing upon the facts involved. These facts, so far as material to our inquiry, may be briefly stated as follows:

In the latter part of the year 1908, the appropriation for the use of the militia of the state being wholly exhausted, Ortis Hamilton, then adjutant general, opened an account with the relator bank in his own name as adjutant general. For the purpose of obtaining credit upon such account, Hamilton assembled certain claims and alleged claims against the military fund, together with alleged vouchers therefor, aggregating $1,713.58. These claims were deposited with the relator, and it placed to the credit of Hamilton, as adjutant general, the full face value thereof. This fund was wholly disbursed by Hamilton thereafter by checks purporting to have been signed by him as adjutant general.

Thereafter, on March 12, 1909, an act was approved appropriating additional funds to pay claims of this nature. Thereafter, on March 22, 1909, these claims having been audited and allowed by the board of military auditors, were by Hamilton presented to the state auditor, when he issued the warrant, believing at the time that it was being issued in payment of valid claims against the state. The warrant was issued in the name of Ortis Hamilton as adjutant general, who thereupon indorsed and surrendered the same to the relator in lieu of the claims upon which he had obtained credit with the relator, and thereupon the warrant became the property of the relator. Over $1,300 of the amount of these claims was based upon false, fraudulent, and forged vouchers, and the state received no benefit whatever on account thereof. This fact was well known to Hamilton at all times since the creation of the pretended indebtedness represented by such fraudulent vouchers, and except as to Hamilton himself, who was a member of the board of military auditors, the auditor and state officers did not know of the fraudulent character of these claims until after the issuing of the warrant thereon.

It needs no argument to demonstrate that if Hamilton was

the relator in this proceeding and still the holder of the warrant, he could not successfully maintain this proceeding and thereby enforce the payment of the warrant by the treasurer. This being the law, the relator, of course, is in no better position, unless it be held that the warrant is negotiable paper acquired by the relator as an innocent holder for value before maturity. That such warrants are "not negotiable in the sense of excluding inquiry into the legality of their issue or to exclude defenses thereto," has been determined by the previous decisions of this court, in harmony with the general rule upon that subject. *Bardsley v. Sternberg*, 17 Wash. 248, 49 Pac. 499; *West Philadelphia Title & Trust Co. v. Olympia*, 19 Wash. 150, 52 Pac. 1015; 28 Cyc. 1570.

It is suggested by learned counsel for the relator that since, under §§ 7222 and 7223 of Rem. & Bal. Code, these claims were audited and allowed by the board of military auditors, the state ought not now be heard to say the warrant issued thereon is invalid. There would be some force in this contention if there was anything in those sections which indicated an intention on the part of the state to give to such warrants the full force of negotiable instruments; but clearly there is no such intention therein expressed, and we would not be warranted in imputing to the legislature any such intent unless the law clearly so indicated.

We are of the opinion that since the admitted facts show this warrant to have been illegally issued, in that it was based largely upon false and fraudulent claims, the treasurer's duty to refuse payment thereof is clear, whether it be presented by the original payee or his assignee, the relator.

It was suggested on the oral argument that, since the agreed facts show the amount of the fraudulent claims and valid claims separately, upon which the warrant was issued, we should in any event direct payment of the warrant for the amount of the valid claims. This would be performing the duty of the auditing board and the state auditor. We

have nothing before us indicating that the auditing board and auditor will refuse to audit and issue a warrant for the proper amount of these valid claims upon surrender of this warrant. And even if this record did so indicate, we are unable to see how the treasurer could be compelled to pay such amount except upon a proper warrant therefor issue by the auditor. When a proper warrant in payment of these claims is refused the relator, it will be time enough for the courts to hear any controversy arising upon such refusal. The treasurer's duty, among others prescribed by statute, is "To disburse the public moneys only upon warrants drawn upon the treasurer by the state auditor." Rem. & Bal. Code, § 9026. We do not think it is within our province in this proceeding to adjudicate the amount due upon these claims, even though the agreed facts leaves no uncertainty as to such amount.

The writ is denied.

MOUNT, FULLERTON, and GOSE, JJ., concur.

[No. 9099. Department One. February 28, 1911.]

SEATTLE TRANSFER COMPANY, *Appellant*, v. THE CITY OF SEATTLE *et al.*, *Respondents*.[1]

MUNICIPAL CORPORATIONS—IMPROVEMENTS—ASSESSMENTS—STIPULATIONS—AMBIGUITY—PAROL EVIDENCE TO EXPLAIN. Where petitioners for a change of grade stipulated in their petition that property damaged shall not be assessed in excess of six dollars per front foot and reserved the right to recover damages, a stipulation entered into at the trial, whereby it was agreed that their property was damaged in the sum of ten dollars and that the same shall be liable to assessment for the improvement, is based upon a new consideration not contemplated when the petition was filed, and admits of assessment in excess of six dollars per front foot; and the same is so clear and unambiguous as not to admit of explanation by parol evidence.

[1]Reported in 113 Pac. 627.

Appeal from a judgment of the superior court for King county, Albertson, J., entered May 19, 1910, dismissing an action to reduce a local improvement assessment, after a hearing before the court without a jury. Affirmed.

James B. Metcalfe and *John S. Jurey*, for appellant.

Scott Calhoun and *King Dykeman*, for respondents.

PARKER, J.—The city of Seattle levied a special assessment upon property of the plaintiff to the extent of $8.68 per front foot, with other property, to pay the expense of improving Jackson street by changing the grade thereof. The plaintiff, by this action, seeks to have the assessment reduced to $6 per front foot; contending that, by reason of damages awarded to it in the condemnation proceeding for injury to its property by the change of grade, and certain stipulations made in connection with that proceeding, the city cannot lawfully charge more than $6 per front foot against the property. A trial resulted in a judgment denying the relief prayed for, and the plaintiff has appealed therefrom.

On October 6th, 1905, a majority property owners' petition was presented to the city authorities asking for a change of the grade of Jackson street, and the improvement of the street at the proposed new grade. Appellant was a signer of that petition, being the owner of property liable to be damaged by the change of grade, and also liable to be assessed for the proposed improvement. Before the grade could be changed it was necessary to institute condemnation proceedings to determine the amount of damages which would result to abutting property by reason of the change of the grade. To the end that the property so damaged would also be subject to assessment to assist in paying the expense of the improvement, the petition contained the following stipulation:

"Your petitioners sign this petition upon the conditions hereinafter stated, and in consideration of the making of

the improvement herein petitioned for, stipulate as follows:

"First: That the undersigned, in signing this petition, hereby expressly reserve the right to claim a just compensation for the damages to their property caused by the grading and regrading of the streets embraced in the district, but agree, notwithstanding that damages may be so awarded to pay not to exceed a cost of six dollars ($6) for each front foot (as defined by the city charter), chargeable to the abutting property so damaged, providing, however, that the limit of assessment of $6 shall not apply to the property within said district not damaged, which said property shall be assessed according to special benefits arising by reason of said improvement; . . .".

Thereafter, on December 18, 1905, the city passed Ordinance No. 13,102, establishing the new grade and providing for the institution of condemnation proceedings to determine the amount of damages thereby resulting to abutting property. Thereafter, on February 9, 1906, the city passed Ordinance No. 13,309, providing for the making of the improvement according to the new grade, and for assessing the expense thereof against the property benefited thereby. Thereafter, on October 8, 1906, the condemnation proceedings came on for trial, when the appellant and city entered into a stipulation in writing as follows:

"It is hereby stipulated and agreed by and between the city of Seattle and the undersigned property owners that a verdict shall be entered in said cause in the sum of ten dollars in favor of the Seattle Transfer Company, as damages to lots 1, 2, 3, 4, 5, 7, 8 and 9, and the north 40 feet of lot 6 and vacated alley, in block 210, Seattle Tide Lands, by reason of the changing of grades and the regrading of Jackson street and other streets as provided by Ordinance No. 13,102; it being expressly agreed between the parties hereto that the entry of said verdict shall not, in any manner, waive the right of the city to assess said property for the cost of said improvement; and said owners hereby expressly agree that said property shall be liable to assessment by the city council for the payment of the actual improvement of said street under Ordinance No. 13,309 of said city."

A verdict was returned accordingly, when the court entered its judgment as follows:

"That the just compensation to be made for the damaging of the following described property, to wit: lots 1, 2, 3, 4, 5, 7, 8 and 9, and the north 40 feet of lot 6, in block 210, Seattle Tide Lands, and the vacated alley adjoining the same, which the Seattle Transfer Company claims to own, or to be otherwise interested in, is the sum of ten dollars ($10): Provided, that said property shall be liable to assessment for the actual improvement of said streets in accordance with the grades established by said Ordinance No. 13,102."

Thereafter appellant received from the city the amount awarded to it by the verdict and judgment, together with its costs, and satisfied the same of record. The city proceeded with the improvement, prepared an assessment roll, and charged the property of appellant $8.68 per front foot as its proportionate part of the expense of the improvement. This assessment was made by the city authorities under Ordinance No. 13,309 and the city charter, to pay for the physical improvement. The matter of assessment by eminent domain commissioners to pay the damages occasioned by the change of grade is not here involved.

The sole contention of learned counsel for appellant is that this assessment, in so far as it exceeds $6 per front foot, is void, and the sole ground upon which this contention is made is that the city had no authority to assess appellant's property more than $6 per front foot, because of the damage resulting to its property by the change of grade and the stipulations entered into, especially the stipulation contained in the petition first above quoted. If the first stipulation was the only one lending support to the assessment, there would be ground for holding that the assessment could not be sustained in excess of $6 per front foot, under the rule announced in *Seattle & Puget Sound Packing Co. v. Seattle*, 51 Wash. 49, 97 Pac. 1093. At the trial counsel for appellant offered in evidence the first stipulation, and

they attempted to introduce oral evidence to show the understanding of appellant and the city when they entered into the second stipulation at the time of the trial. This was for the purpose of inducing the court to construe the second stipulation, together with the first one, as limiting the assessment to $6 per front foot. The court declined to consider the evidence for that purpose, upon the ground that the second stipulation was clear and unambiguous, and hence, could not be explained by oral evidence of any previous understanding between the parties. Also, that it was a new and independent stipulation without reference to the first one contained in the petition.

It is not contended that there was any fraud or mistake in the making of the second stipulation, the purpose of the offer of evidence being only to explain its meaning. We agree with the learned trial court that the language of this second stipulation is so clear and certain as not to require or admit of explanation. The same may be said of the language of the judgment entered in pursuance of the second stipulation. It appears upon the face of this stipulation that it is supported by valuable considerations flowing from each to the other of the parties. The city agreed "that a verdict shall be entered in said case in the sum of $10 in favor of the Seattle Transfer Company as damages," etc. The appellant agreed:

"That the entry of said verdict shall not, in any manner, waive the right of the city to assess said property for the cost of said improvement; and said owners hereby expressly agree that said property shall be liable to assessment by the city council for the payment of the actual improvement of said street under Ordinance No. 13,309 of said city."

This, it seems to us, is an entirely new and independent stipulation from that contained in the original petition, and is based upon considerations not then in contemplation. The first stipulation was made without any thought of the city consenting to a verdict in appellant's favor. We therefore

think that this stipulation must be construed at this time as though it was the only one in the case. And we think it clearly expresses an intention that the city may assess the property as though it was entirely unrestricted by a verdict for damages in appellant's favor.

We are of the opinion that the judgment of the trial court should be affirmed. It is so ordered.

MOUNT, FULLERTON, and GOSE, JJ., concur.

[No. 9378. *En Banc.* February 28, 1911.]

E. B. McGILL, *Appellant*, v. F. R. HEDGES *et al.*, *as Councilmen of the City of Everett, Respondents.*[1]

MUNICIPAL CORPORATIONS — TAXATION—LIMITATIONS—CHARTER—STATUTES—CONFLICT. Rem. & Bal. Code, § 9281, providing that the city council shall fix the tax rate "needed to raise sufficient revenue to carry on the "municipal government for one year," does not conflict with the Everett city charter § 222, limiting the levy to eight mills on the dollar, under the rule that the two must be construed together and harmonized if possible; since the statute merely requires the fixing of the rate within the limit, and a levy in excess of eight mills is accordingly void (FULLERTON, J., dissenting).

Appeal from a judgment of the superior court for Snohomish county, Black, J., entered January 11, 1911, in favor of the defendants, after a trial before the court upon an agreed statement of facts, in an action to enjoin the levy and collection of a supplemental tax on real property. Reversed.

Hathaway & Alston, for appellant.

Benj. W. Sherwood and *Ralph C. Bell*, for respondents.

MOUNT, J.—The appellant, as a taxpayer, brought this action to enjoin the municipal authorities of the city of Everett and the county auditor and treasurer of Snohomish

[1]Reported in 113 Pac. 635.

county from levying and collecting a supplemental tax upon the property within the corporate limits of the city of Everett. The case was tried upon an agreed statement of facts. The trial court denied the relief prayed for, and issued an order directing the defendants to proceed with the levy and collection of the tax. The plaintiff has appealed from that order.

It appears from the agreed facts that the city of Everett is a city of the first class, and in the year 1907 adopted a charter which provides as follows:

"Sec. 222. The aggregate of all taxes levied for city purposes, exclusive of bond interest and sinking fund levies, shall not exceed in any one year eight mills on each dollar of valuation of taxable property. The city council shall also have power and authority, at the same time the levy or levies of taxes are made as provided in this section, to levy the taxes necessary to pay the interest accruing during the year on bonded indebtedness of the city and for the redemption of bonded indebtedness of the city."

In September, 1910, the city council of the city made an itemized estimate of the expenses of the city for the year 1911, and also an itemized estimate of the revenues for that year. Notice was given as required by law, that the city council would meet on the first Monday in October, 1910, for the purpose of making tax levies as stated in the estimates. Pursuant to this notice, the city council met and regularly passed an ordinance fixing the rate for city purposes at eight mills on each dollar of valuation of taxable property within said city. Thereafter a contingency arose by which the estimated revenues of the city were reduced in a sum exceeding $77,000. Thereafter, on December 31, 1910, a supplemental estimate was made, which showed that the levy made in October was insufficient to meet the estimated expenses of the city for the year 1911. Thereupon notice was given of a supplemental levy for city purposes, and pursuant to this notice, on January 9, 1911, the city council passed an ordinance making an additional levy of five mills

on each dollar of valuation of taxable property within the said city; thus making the total levy for city purposes thirteen mills on the dollar. Thereupon this action was begun to restrain the collection of the levy in excess of eight mills. It is clear that, if § 222 of the city charter above quoted is of any force, the order of the lower court is erroneous, because the levy made on October 8, 1910, for the year 1911, was for the limit fixed by the charter.

But it is argued by the respondents that the charter provision limiting the levy to eight mills is of no effect, because § 9281, Rem. & Bal. Code, and § 1 of chapter 138 of the Laws of 1909, page 531 (Rem. & Bal. Code, § 9208), provide that such cities shall fix a rate of taxation sufficient to raise the necessary revenue to carry on the different departments of the municipal government thereof for one year, and that the charter must yield to the statute. It may be conceded that the provisions of the charter in conflict with the statute upon the same subject must yield to the statute, but there is no conflict between the provisions of the charter and the statute upon the rate of levy in question here. Section 9281 of Rem. & Bal. Code is as follows:

"The city council of each city of the first class shall within thirty days after receiving the certificate of the county assessor, as provided in the preceding section, by ordinance in each year fix the rate of taxes to be levied and levy the taxes upon all taxable property, both real and personal, in such city, or subject to taxation therein, as shown by said roll, needed to raise sufficient revenue to carry on the different departments of the municipal government thereof for one year, which year shall be the fiscal year (to be designated in the ordinance) fixed by the charter of such city, and shall be either the current or ensuing fiscal year as required by such charter, or, in the absence of a charter requirement, as such ordinance shall provide. Any other general taxes authorized by the charter of such city to be levied with the annual tax levy may be included in such levy."

If § 1 of chapter 138, Laws of 1909, page 531 (Rem. & Bal. Code, § 9208), has any application to this case at all,

it does not change the rule of the statute above quoted. This statute does not fix the limit of the levy, nor attempt to do so. It says the city council shall fix the rate "needed to raise sufficient revenue to carry on the different departments of the municipal government thereof for one year." It is not uncommon to fix a limit of tax levy in city charters. The object of such limitation is to prevent the expenditures from becoming burdensome and to keep the necessary expenditures within that limit. When this act was passed, the legislature no doubt had in mind that there were such limitations upon expenditures in cities of the first class, and therefore fixed no limit in this provision. If another section of the statute had fixed the limit of levy at eight mills for city purposes, in the language of § 222 of the city charter of Everett, it could not be reasonably said that the provision in another section authorizing the city council to fix a rate "needed to raise sufficient revenue to carry on the different departments of the municipal government thereof for one year" was in conflict with the limit fixed at eight mills, because the two provisions must be construed together and made to harmonize if possible. That rule must be applied here, and when so applied, there is no conflict, for the statutory provision must be held to mean that the city must keep within the limit of eight mills fixed by its charter, and that the amount necessary to carry on the different departments of the city government for the year may not exceed the limit fixed. The excessive levy was, therefore, without authority of law, and void.

The judgment is reversed, and the cause remanded with directions to enter a judgment as prayed for in the complaint.

DUNBAR, C. J., PARKER, GOSE, CHADWICK, and MORRIS, JJ., concur.

FULLERTON, J., dissents.

CROW, J., took no part.

[No. 9047. Department Two. February 28, 1911.]

ANGIE COLLINS *et al.*, *Executors etc.*, *Appellants*, v. A. N. HOFFMAN *et al.*, *Respondents*.[1]

TAXATION—FORECLOSURE—VACATION—FRAUD—EVIDENCE—ADMISSIBILITY—ATTORNEY AND CLIENT—PRIVILEGE. Upon an issue of fraud in an action to set aside a tax foreclosure, where it appears that the certificate of delinquency was issued to the manager and secretary of a corporation, then the owner of the property, and assigned to a third party, and subsequently the corporation conveyed the property to plaintiff, and the tax foreclosure proceeded in the name of the assignee and against the corporation, the manager accepting service, without giving any notice to the plaintiff, it is error to exclude evidence of the attorney who foreclosed the certificate, and ostensibly represented the assignee, showing that he was in fact employed by the manager of the corporation, the sole defendant in the foreclosure suit; since the attorney's testimony and letters between him and the manager are not privileged, and the existence of the relation of attorney and client between them would establish the fraud.

FRAUD—EVIDENCE—ADMISSIBILITY. Upon an issue of fraud, tried to the court, latitude should be allowed to show any circumstances from which fraud could be naturally inferred.

CORPORATIONS—OFFICERS—REPRESENTATION—FRAUD—TAXATION—SALE. The secretary and manager of a corporation cannot purchase at a tax sale property of the corporation without color of fraud against the corporation or its grantee.

WITNESSES—PRIVILEGE—ATTORNEY AND CLIENT. An attorney is not privileged from disclosing by whom he was employed nor the terms of the employment.

SAME. Letters between an attorney and client are not privileged irrespective of the nature of the confidential disclosures.

APPEAL AND ERROR—DECISION—REMAND. The dismissal of a case tried to the court, upon excluding plaintiff's evidence, results in a mistrial, as the supreme court cannot try the cause *de novo*, or preclude the defendants from making their defense.

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered February 11, 1910, dismissing an action to cancel a tax foreclosure deed and to

[1]Reported in 113 Pac. 625.

quiet title, after a trial before the court without a jury. Reversed.

Hughes, McMicken, Dovell & Ramsey, for appellants.

Kerr & McCord, for respondents.

Morris, J.—Appellants sought in this action to vacate and set aside all proceedings in the foreclosure of a certificate of delinquency for unpaid taxes, upon the ground of fraud. They alleged in their complaint, that on February 13, 1900, the county treasurer of Chehalis county issued the certificate to Robert Lytle; that on the 18th of June, 1900, the respondents fraudulently obtained an assignment of this certificate to respondent Hoffman; that at the time, and until May 3, 1901, the Fidelity Trust Company, a corporation of which respondent Gleason was manager and secretary, was the owner of the premises covered by the certificate, and that on said day the trust company conveyed the property to John Collins; that on August 6, 1902, respondents, for the purpose of defrauding Collins, who had no knowledge that the taxes were unpaid or the certificate issued, commenced the foreclosure action, Gleason accepting service on behalf of the trust company; that Gleason was the real party in interest in the obtaining of the assignment and the instituting of the foreclosure proceedings, and paid all costs therein, Hoffman simply lending his name to Gleason for the purpose of the transaction; that in October, 1902, judgment was entered in the foreclosure proceedings, and on April 22, 1903, Collins died without any knowledge of any of these matters. There are other allegations in the complaint relative to the fraud claimed to have been perpetrated upon Collins, which it will not be necessary to set forth for the purpose of setting forth our view of the questions submitted. Respondents answered, denying the fraud, and the cause came on for trial.

Appellants called as a witness L. H. Brewer, who was deputy prosecuting attorney of Chehalis county at the time

of the foreclosure, and conducted the foreclosure proceedings. He was asked how he happened to appear as attorney in the proceeding, whether by ordinary retainer or otherwise; to which respondents entered an objection, and the same was sustained. Counsel for appellants then offered to show by the witness that he acted in the foreclosure proceedings by virtue of his relation to the prosecuting attorney's office, under the statute making it the duty of prosecuting attorneys of all counties to conduct, without charge or fee, all proceedings for the foreclosure of certificates of delinquency; and that while so acting, he received a number of letters from Gleason containing evidence of appellants' contention that Gleason had paid all the expenses of the foreclosure proceedings, given directions in regard to the same, and was the real owner of the certificate; and in support of this offer, copies of certain letters were offered in evidence. Counsel for respondents objected to these letters, upon the ground that they came within the rule of privileged communications between attorney and client, which objection was sustained. The witness was then asked if he had ever received any compensation from respondents for his services in the foreclosure proceedings. He refused to answer upon the ground of privilege, and his refusal was sustained by the court. He was then asked if he had written any letters to respondents during the foreclosure proceedings, or in reply to letters addressed to him by Gleason; to which objection was made upon the ground of privilege, and sustained. At the conclusion of the evidence, the court entered judgment of dismissal, and the case is brought here for review of the errors assigned in the foregoing rulings.

We are of the opinion that each of these rulings was erroneous. The issue was fraud.

"From the very necessities of the case, and from the fact that fraudulent intentions are always hidden, and that fraudulent motives are always concealed or attempted to be concealed, courts allow the widest possible latitude consistent

with established rules of law in the investigation of causes wherein fraud is alleged; and the rules governing the introduction of testimony are necessarily relaxed." *O'Hare v. Duckworth*, 4 Wash. 470, 30 Pac. 724.

Upon such an issue as here raised, especially in a trial to the court alone, the plaintiff should have been permitted to thoroughly sift the transaction and explore the entire field, and show any circumstances from which an inference of fraud was natural. *Millar & Co. v. Plass*, 11 Wash. 237, 39 Pac. 956. Upon the face of the record before the court, Brewer, whether as deputy prosecuting attorney or private counsel, represented Hoffman, named as assignee of the certificate and plaintiff in the foreclosure proceedings; but this could not prevent appellants showing, by Brewer himself, that Hoffman was but a name under which Gleason, the true owner and real plaintiff, was acting. If the facts were as they appeared upon the face of the record, and Hoffman was the true assignee and real plaintiff, no communication between Brewer and Gleason could have been privileged. In order to hold such a privilege, the court must have found that Gleason was the true owner and plaintiff, which was the very thing that appellants were seeking to prove and which, coupled with Gleason's admission that he was the manager and secretary of the Fidelity Trust Company, the grantor of Collins, and owner of the property at the time of the issuance of the certificate, and the only named defendant in the foreclosure proceedings, would have gone a long way in proving what appellants were seeking in the action to establish. The law would hardly permit Gleason, representing the Fidelity Trust Company in so close and confidential a relation, whose duty it was to pay the taxes, to become a purchaser at a sale made because of the failure to pay the taxes, and obtain a title without color of fraud as against either the trust company or its grantee. *Moss v. Shear*, 25 Cal. 38; *Christy v. Fisher*, 58 Cal. 256. In no event was Brewer privileged from disclosing by whom he was employed in the

foreclosure proceedings, nor the terms of such employment. *Stanley v. Stanley*, 27 Wash. 570, 68 Pac. 187; Weeks, Attorneys, 324.

Neither was he disqualified or under privilege from disclosing any communication not in the nature of a confidential disclosure. *Williams v. Blumenthal*, 27 Wash. 24, 67 Pac. 393; *Aaron v. United States*, 155 Fed. 833. Neither were the letters, copies of which were included in the offer of proof and which are sent up in the record as "identifications," inadmissible or improper as evidence because of being privileged. They do not come within the rule of privileged communications given to an attorney in strict and professional confidence, in order to enable him the better to ascertain his client's rights and to protect and maintain them. And while we confess the sound and wise policy of the law in establishing the rule of privilege as between attorney and client, it will not do to say that, because of such a relation, every act and communication between them, irrespective of its nature, is within the rule, and the relationship once being established all further inquiry must cease. These letters, however, are only here as identified offers of proof. They were not properly identified so as to admit them as evidence, because of the court ruling them as privileged. We cannot, therefore, accept and review them as evidence, and are limited to passing upon their admissibility. Neither could we foreclose respondents' right to meet them in any proper way. We are, therefore, unable to try the cause *de novo* here, or to direct any judgment other than to announce a mistrial because of erroneous rulings in the refusal to admit evidence.

The judgment is reversed, and the cause remanded for a new trial.

DUNBAR, C. J., and CROW, J., concur.

CHADWICK, J. (concurring)—Gleason was secretary and manager of the Fidelity Trust Company, and Hoffman was cashier of the American Savings Bank, an allied corporation, at the time Collins acquired the legal title to the property in

controversy. If the certificate was acquired by Gleason or Hoffman—it can make no difference—at a time when the legal title was in the trust company, and the trust company sold the property to Collins, it knew, being charged with the knowledge of its manager Gleason, that the certificate was outstanding; and upon the foreclosure, which was directed by Gleason, it became the duty of the trust company and Gleason, its manager, to inform its grantee, or at least make him a party to the foreclosure proceeding. Instead of doing this, service was accepted by Gleason for the trust company, the acceptance being as follows:

"This is to certify that I am one of the officers of the Fidelity Trust Company, and that I have power by virtue of the position I hold to accept service for said company, and I further certify that on this 7th day of August, A. D. 1902, I said Fidelity Trust Company, through me, received a true and certified copy of the hereto attached summons, wherein A. N. Hoffman was plaintiff and Fidelity Trust Company defendant, said copy being certified to be a true copy of the original by L. H. Brewer, Deputy Prosecuting Attorney of Chehalis county, Wash., and all further service is hereby waived. Fidelity Trust Company,
"By J. P. Gleason, Sec'y."

It cannot be successfully contended that either Gleason or Hoffman could set up title under the foreclosure as against the trust company, and clearly, equity should not tolerate such an assertion against its grantee. An officer of a corporation should not be allowed to profit at the expense of those who deal in good faith with the corporation, or to suppress such information concerning its transactions as would in good conscience inure to their benefit. There is enough in the record to warrant a judgment in favor of appellants; but being overruled in this conclusion, I can nevertheless concur in the result.

[No. 9156. Department Two. March 3, 1911.]

ANNA ALDEN, *Respondent* v. JOHN H. HANSON *et al.*, *Appellants.*[1]

WORK AND LABOR—ACTION FOR SERVICES—DEFENSES—PAYMENTS—BURDEN OF PROOF. In an action for services, where the plaintiffs received moneys and were in a trust relation to the defendants, and plaintiffs accounted for the moneys so received to the satisfaction of the jury, the burden of proving payments is not put upon defendants, where the verdict can be sustained under an instruction to the jury that in determining the amount paid they may take into consideration the amounts coming into the plaintiff's hands and not accounted for by her.

APPEAL—DECISION—REMAND. Where the plaintiff's testimony shows that the verdict included the amount of an item improperly charged to the defendants, the judgment will be reversed and remanded with directions to reduce the same in such amount.

Appeal from a judgment of the superior court for Klickitat county, McMaster, J., entered March 29, 1910, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Affirmed.

W. B. Presby, for appellants.

E. C. Ward and *N. L. Ward*, for respondent.

CHADWICK, J.—This action was brought by respondent to recover a balance alleged to be due for wages for personal services rendered by her, and also to recover upon an assigned claim of S. S. Beck for like services; the whole amount alleged to be due, after crediting certain payments, being $403.90. The jury returned a verdict for $400, and defendants have appealed.

Error is predicated upon exceptions taken to the instructions of the court. It is first contended that the instructions put upon the defendants the burden of proving payments which were admitted by the plaintiff, and that the jury was instructed to disregard any credits claimed by defendants

[1]Reported in 113 Pac. 768.

other than actual cash payments. To discuss these objections at length would serve no purpose. It is sufficient to say that the whole record does not, in our judgment, bear out appellants' contentions.

It is also contended that the court put upon appellants the burden of proving payments when it was made to appear that respondent and her assignor had been employed to conduct a hotel and livery stable for appellants; that they contracted debts and received moneys, thus being in a trust relation to the appellants; and it was therefore incumbent upon respondent to account for all sums so received and paid out, and that no burden rested on appellants to prove either the collection of moneys or their application. We can agree with the rule of law contended for by appellants, but the evidence shows that respondent attempted to, and did, to the satisfaction of the jury, account for the moneys so received, and that the testimony in this behalf is sufficient to sustain the verdict when considered in the light of the court's instructions that "in determining the amount paid by defendants upon the accounts of the plaintiff, you may take into consideration the amount, if any, of the money of the defendant coming into the hands of the plaintiff and not accounted for by her to said defendant." A like instruction was given covering the claim of her assignor, Beck.

A motion for new trial was made, and among the grounds urged is the one that the verdict is excessive. It seems to have been the custom of respondent to meet current bills out of the receipts of the hotel. Among other items referred to in the testimony, is one of $63.35, paid one August Kuhnhausen for groceries and supplies, for which respondent has taken credit to herself. This sum was not paid out of the moneys collected by her for the credit of appellants, but was paid by appellant John Hanson in this wise: He drew his personal check for $68.35. This was handed to Beck, who delivered it to Kuhnhausen, who in turn paid the difference—five dollars—to Beck, who handed it to Hanson. It is claimed

by counsel for respondent that the testimony shows that this item was entered as a cash receipt, and again entered as an expense item, thus balancing the account. The record shows that there were certain exhibits in the way of accounts and books admitted at the trial, but we have nothing to guide us except the statement of facts, the exhibits not being made a part of the record. From the testimony of the respondent herself, we are satisfied that the amount of the Kuhnhausen bill was improperly charged to the appellants, and that no corresponding credit was given. The judgment should be reduced in the sum of $63.35. The case will be remanded with instructions to so enter the judgment. In all other respects the judgment is affirmed, with costs to the appellants.

DUNBAR, C. J., CROW and MORRIS, JJ., concur.

[No. 9257. Department Two. March 3, 1911.]

THE STATE OF WASHINGTON, *Respondent* v. J. B. WILLIAMS, *Appellant*.[1]

CRIMINAL LAW—EVIDENCE—STATEMENTS OF CODEFENDANT—ADMISSIBILITY. In a prosecution against two persons for obtaining money under false pretenses, evidence of a conversation between the prosecuting witness and one of the defendants when the other defendant was not present is admissible, if the facts show a concert of action and that both defendants were parties to the crime, although separate trials were had and no conspiracy was charged.

CRIMINAL LAW—IDENTIFICATION OF ACCUSED—SUFFICIENCY. A conviction will not be set aside for insufficient identification of the accused at the preliminary hearing by the prosecuting witness, where he sufficiently identified the accused at the trial.

CRIMINAL LAW—PRESUMPTION AS TO POSSESSION OF STOLEN PROPERTY—INSTRUCTIONS—HARMLESS ERROR. Where money was found concealed on the accused when arrested shortly after a theft, it is not error to refuse an instruction that the presumption of guilt from the possession of stolen property attaches only when the money is shown to have been stolen, and is destroyed by reasonable

[1]Reported in 113 Pac. 780.

explanation, where the jury were instructed that such presumption applies only to property identified as stolen and that they must find beyond a reasonable doubt that the accused had obtained the money charged to have been stolen.

Appeal from a judgment of the superior court for Kittitas county, Kauffman, J., entered January 31, 1910, upon a trial and conviction of grand larceny by false pretenses. Affirmed.

Welch & Crotty for appellant.

E. K. Brown and *Short & Gleysteen*, for respondent.

CHADWICK, J.—The testimony of the state shows that, on the night of the 2d day of December, 1909, the prosecuting witness, Reuben Johnson, took Northern Pacific train No. 258, east-bound, leaving Seattle at 11:30 at night; that between Seattle and Auburn he picked up an acquaintance with appellant's codefendant, informed against as Brown, who represented to him that his name was Harris, that he was engaged in the butchering business in East St. Louis, that his brother had died at Everett a month or two before, that he had gone to Everett at the request of his brother's wife to assist her in fixing up his brother's affairs, that he had so far accomplished this purpose as to permit his sister-in-law to leave Everett, and that she and her children, as well as his own wife, were in a rear coach. Harris, or Brown as the case may be, further represented to Johnson that he had had some difficulty in shipping his sister-in-law's goods, a part of them being lost or misplaced at Seattle; that the property consisted of a lot of household goods and a jewelry stock of the value of about $17,000, which was in the express car. During the night Harris went to the rear of the train several times, carrying the impression to Johnson that he was looking after his folks; and he likewise went to the front part of the train two or three times, holding out to Johnson the impression that he was making inquiries about the express matter and goods mentioned above. A short time before the train

reached Cle Elum, Brown returned from the front of the train, saying that everything was all right; that the missing packages had been located.

When the train stopped at Cle Elum, appellant, wearing a trainman's cap, came into the car where Johnson and Brown were sitting and inquired for Mr. Harris. Brown identified himself as the person wanted; whereupon appellant said that he was the station agent at Cle Elum, and that he had a charge of $88 against the express matter which Harris had on the train. Thereupon Brown produced a check for about $800. This appellant refused to receive, saying that he did not carry change for such an amount of money. Brown then asked the prosecuting witness if he could pay the money. Upon being told that he did not have that amount, Brown said, "How much have you got?" Johnson said that he had $80. Brown then said that would be enough as he had found that he had $20 in money, and that if Johnson would let him have the money he would cash the check at the next station and repay him. Johnson did so, whereupon appellant and Brown left the car to make the change. As they left the car, Brown said to the prosecuting witness, "You keep my seat for me." After a few moments Johnson became suspicious and went out on the platform. Brown and appellant had disappeared. The train was ready to go and the conductor refused to hold it longer. Johnson went on to Ellensburg, returning on the next train. From Ellensburg he had communicated with the city marshal of Cle Elum, who met him, and upon his identification, arrested appellant and Brown, who were about to take the same train westbound.

It is admitted that appellant went to Cle Elum on that train, but he disclaims any acquaintance with or knowledge of Brown prior to that morning, when he met him in Cle Elum. It is shown that they had several drinks together and that they ate breakfast together. When searched, $24 was taken from appellant; but on a second search, two twenty-dollar

bills were found concealed in his hand. About eight dollars was found on Brown, and thereafter the sheriff found two twenty-dollar bills concealed in his overcoat. The facts, so far as they pertain to appellant, are in the main denied. He maintains that he went to Cle Elum at the suggestion of a saloon man in Seattle, for whom it is shown he worked as an extra bartender; but that he found upon inquiry that there was already a surplus of bartenders in Cle Elum, and he was taking the first train back to Seattle. Testimony was also introduced tending to account for the money found in his possession, it being shown that he had pawned a ring for $100 on the day before. Appellant and Brown were informed against jointly, but appellant claimed, and was granted, a separate trial. The jury found against him upon all the disputed questions of fact, and he brings this case to us, assigning first, that the court erred in admitting the testimony of the prosecuting witness detailing the conversations and statements of his codefendant Brown, not made in his presence.

It is contended that this ruling deprived appellant of the benefit of a separate trial, inasmuch as no conspiracy is charged in the information. Such evidence is admissible whether defendants are tried jointly or separately. Otherwise, although the crime be single, if it be committed by two or more, a conviction might be avoided in every case by demanding separate trials. This question was first presented to this court in *State v. Payne*, 10 Wash. 545, 39 Pac. 157. In that case Payne was tried separately, and statements of his codefendants were put in evidence against him. While the court said in that case that only such statements had been admitted as were made in the presence of the defendant, yet the argument of the court shows that it was mindful of the broader rule. It was there said:

"The statements and acts of the appellant, or those to which he was a party, were admissible for the purpose of

showing the surroundings and circumstances which culminated in the assault. The jury were entitled to know the state of mind of the defendant and those with whom he was so intimately associated. Such knowledge would better enable them to determine the facts connected with the assault itself. This evidence was therefore admissible for the purpose of placing the jury in possession of the circumstances which led up to the assault in which the fatal wound was inflicted. . . . To our minds it clearly appeared from the proofs that these persons were acting in unlawful concert. . . . This being so, the court could have rightfully opened the door as to the statements and actions of one or all of these parties much wider than it did."

See, also, *State v. McCann*, 16 Wash. 249, 47 Pac. 443, 49 Pac. 216; *State v. Dilley*, 44 Wash. 207, 87 Pac. 133. In the latter case this court adopted the expression of the trial judge as a correct statement of the law. He said:

"Her statements made at that time, if she made any, are competent evidence against her at this time. But as to whether or not it constitutes any evidence against the other two defendants depends upon whether or not the proof shows that there was concerted action between all three of the defendants."

This court, continuing, said:

"The parties were being tried jointly, and such evidence as was admissible against one of them was properly admitted, its applicability to the others to be thereafter controlled by proper instructions when all the evidence was introduced."

In the several cases cited by this court and to which we have referred, there was no charge of conspiracy made in the information, the *Dilley* case and the *McCann* case being robbery cases, and the charges being brought under the statute defining that crime. It is thus indicated that the admissibility of such testimony cannot be resolved by looking to the form of the pleading. It must be decided by reference to the facts and circumstances of the particular case. If the defendant be charged with another, and the facts show a concert of action, a verdict will not be overthrown because it

has been necessary in the development of the case to show the conduct and conversation of the parties, if in the end it is made to appear that both of the defendants were parties to the crime. 3 Ency. Evidence, 420; *Goins v. State*, 46 Ohio St. 457, 21 N. E. 476; *State v. Montgomery*, 56 Iowa 195, 9 N. W. 120.

It is next urged that appellant was not sufficiently identified. This is sought to be sustained by reference to the testimony of the justice of the peace who conducted the preliminary examination. He said:

"Q. You were the justice of the peace, before whom the preliminary examination was held in this case, Mr. Willis? A. Yes, sir. Q. Your name is S. E. Willis? A. Yes, sir. Q. Will you tell to the jury what the prosecuting witness Reuben Johnson said, when he was called upon to testify as to his identification of the defendant? A. Well, Johnson was asked if he thought that was the man, and said 'I think that is the man,' and Mr. Williams said, 'I object to being held over on that kind of identification,' and Mr. Johnson said he was the man."

If this were to be held insufficient, the evidence of the prosecuting witness as we find it in the record was sufficient, if believed by the jury, to warrant the verdict in this regard.

Appellant requested the following instruction:

"The court instructs the jury that it is the possession of money shown to have been stolen, that raises the presumption of guilt on the part of the possessor; not the possession of a like property merely, and such presumption is destroyed whenever a reasonable explanation is given, and is not shown to be untrue."

This was refused, and in lieu thereof the following was given:

"I instruct you that the mere possession of property recently stolen does not of itself raise a presumption that the party in whose possession it is found stole it, but it is a circumstance to be taken by the jury into consideration in determining the guilt or innocence of the defendant, and any reasonable explanation which the defendant may make as to

his possession of the property is also to be taken into consideration in passing upon such question. Of course this instruction applies to property which has been identified as that stolen, and not the property which merely resembles it."

It is earnestly contended that this instruction was a comment on the facts, and was prejudicial in that the court assumed that the money found in the possession of the appellant was "recently stolen." *State v. Humason*, 5 Wash. 499, 32 Pac. 111; *State v. Walters*, 7 Wash. 246, 34 Pac. 938, 1098; *State v. Payne*, 6 Wash. 563, 34 Pac. 317; *State v. Bliss*, 27 Wash. 463, 68 Pac. 87, are cited by appellant as sustaining his theory. Measured by the cases relied on, we find no vice in the instruction. Instructions must be given a reasonable interpretation, for we must assume that the words of the trial judge fall upon the ears of reasonable men, and that they will not take a single phrase and hang their verdict upon it; but that they will perform their duty and consider the instructions as a whole, keeping sight of the main issue. The jury had been instructed that they must find beyond a reasonable doubt that appellant had obtained the money charged to have been stolen, and if they did not, they should acquit. Taken as a whole, the instructions were more favorable to the appellant than the evidence warranted, and any technical objection that might be charged to a single instruction was more than overcome by the liberal interpretation of the law in behalf of appellant by the trial court.

Judgment affirmed.

DUNBAR, C. J., CROW, and MORRIS, JJ., concur.

[No. 9174. Department Two. March 3, 1911.]

THE STATE OF WASHINGTON, *Respondent*, v. A. F. BROWN, *Appellant*.[1]

CRIMINAL LAW—INFORMATION—VARIANCE. In a prosecution for obtaining money under false pretenses on a certain passenger train, alleged in the information as train No. 258, it is not necessary to identify the train by that number if it is otherwise sufficiently identified.

FALSE PRETENSES—EVIDENCE—FALSITY OF STATEMENTS. In a prosecution for obtaining money under false pretenses, it is not necessary for the state to show that all of the representations were false.

CRIMINAL LAW—EVIDENCE—IDENTIFICATION OF MONEY—SUFFICIENCY. In a prosecution for obtaining money by false pretenses, money taken from the accused is sufficiently identified to sustain a conviction, where the prosecuting witness described it as "currency" "four twenty-dollar bills," "United States Currency" etc., and that one was a yellow bill; the weight of the evidence being for the jury.

SAME—ADMISSIBILITY. Upon a prosecution for obtaining four twenty-dollar bills by false pretenses, evidence that, on the day after, the sheriff found two such bills concealed in the overcoat of the accused after he had been once searched, is admissible without showing that the coat had been at all times in the possession of the accused.

CRIMINAL LAW—TRIAL—REOPENING CASE. It is entirely within the discretion of the trial court to reopen a prosecution for obtaining money by false pretenses to permit further identification of the money.

Appeal from a judgment of the superior court for Kittitas county, Kauffman, J., entered January 24, 1910, upon a trial and conviction of grand larceny by false pretenses. Affirmed.

Mires & Whitfield, for appellant.

E. K. Brown and *Short & Gleysteen*, for respondent.

[1]Reported in 113 Pac. 782.

CHADWICK, J.—This case is dependent upon the same state of facts as the case of *State v. Williams, ante* p. 286, 113 Pac. 780. It is first alleged that the court erred in admitting the testimony of the express messenger, who testified that he had no household goods or jewelry in his possession. This error is predicated upon the theory that the evidence should have shown clearly that the crime had been committed on Northern Pacific train No. 258, as alleged in the information; whereas the prosecuting witness did not identify the train as No. 258, and it was not shown that defendant ever represented that he had any goods or jewelry on train No. 258. The evidence shows that the crime was committed on a Northern Pacific train, and we think the train was sufficiently identified. But if it were not so, the number of the train cannot be held to be a material allegation of the information, any more so than a brand or mark when used in a pleading to identify property. If the thing be otherwise identified, as it was in this case, then the distinguishing mark or number becomes immaterial.

It is next contended that there was no evidence to prove that appellant did not in fact owe the Northern Pacific Railway Company $88. It is true that the state did not prove this fact, nor was it required to do so. The state was not bound to show more than the false pretenses and the loss of the money. It may be that appellant does owe the Northern Pacific Railway Company, but that fact would not absolve one who falsely pretended that he had a right to collect the amount due, or the one who, although he be in fact the debtor, prepared the mind of the victim for the onslaught upon his purse.

It is also insisted that it is not shown that the goods and jewelry were not in the possession of the Northern Pacific Railway Company, or in the possession of the appellant on the train upon which he was riding; that the state went no further than to show that they were not in the possession of the express company. We think this contention is met by

what we have just said, and needs no further comment. *State v. Montgomery*, 56 Iowa 195, 9 N. W. 120.

It is said that the money was not sufficiently identified. The prosecuting witness testified that it was "currency," "four twenty-dollar bills," "United States certificates," "United States currency," "paper money"; that "one was a yellow bill," etc. This court, as well as many others, has recognized that it is generally impossible to identify money with any great degree of certainty, and the best evidence of which the case is susceptible is received, leaving the fact to be determined by the jury. In *State v. Jones*, 53 Wash. 142, 101 Pac. 708, we said:

"Both on cross-examination and redirect examination the witness testified that he was familiar with 'United States money,' and that 'it was United States currency,' and that 'it looked like United States money.' He also described the several denominations of the bills alleged to have been stolen. The weight to be given to this evidence was for the jury. . . ."

See, also, *State v. Johnson*, 36 Wash. 294, 78 Pac. 903.

On the evening of the day on which the robbery was committed, and after appellant had been once searched, the sheriff found concealed in the overcoat of the appellant two twenty-dollar bills, and was permitted to testify to this fact. This is alleged to be error, because it was not shown that the coat was in the appellant's possession at all times after his arrest. The objection goes to the weight of the testimony and not to its relevancy, and appellant is foreclosed by the verdict of the jury.

It is further insisted that the court erred in allowing the case to be reopened after the parties had rested, to prove the identity of the money which had been taken from the possession of the two defendants and kept by the officers pending the trial. This was a matter entirely within the discretion of the trial court. The identity of the money was a question for the jury, and is likewise foreclosed by its verdict.

Judgment affirmed.

DUNBAR, C. J., CROW, and MORRIS, JJ., concur.

[No. 9265. Department Two. March 3, 1911.]

WILLIAM D. LEWIS, *Appellant*, v. ADA L. BAILEY *et al.*, *Respondents*.[1]

VENDOR AND PURCHASER—FORFEITURE—ASSIGNEE OF VENDOR—CANCELLATION OF INSTRUMENTS—PARTIES ENTITLED. Where vendors contracted to sell property in consideration of an agreement by the vendee to pay a mortgage against other property of the vendors, and after default by the vendee the vendors were compelled to make a payment on the mortgage, and subsequently conveyed their interest in the property subject to the contract of sale, "with all their rights thereunder and payments due," the assignees of the vendors are entitled to collect from the vendee the amount paid by the vendors on the mortgage, and may declare a forfeiture of the contract of sale after demand, notice, and default.

Appeal from a judgment of the superior court for Adams county, Holcomb, J., entered August 12, 1910, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action to quiet title. Reversed.

Miller & Lewis, for appellant.

CHADWICK, J.—Prior to August 25, 1908, Clarence Fifield and Viola Fifield, his wife, were the owners of two tracts of land in Adams county, Washington. On that day the Fifields contracted to sell one of the tracts to Ada L. Bailey, one of the defendants herein, the consideration of the said contract being that she would pay a mortgage covering all the lands owned by the Fifields, and the interest thereon, according to the terms and conditions of the mortgage. Time was made the essence of the contract. The court found:

"(5) That by the terms of the said mortgage a payment of interest became due thereon on December 1, 1908, for the sum of $154.40, which sum said defendant, under the terms and conditions of the said contract, promised and agreed to pay.

[1]Reported in 113 Pac. 761.

"(6) That defendants failed and neglected to pay the said installment of interest at the time the same became due, and that said Clarence Fifield and Viola Fifield to protect their interests in said land and other lands and in order to comply with the conditions of the said mortgage so that the same should not be foreclosed, were compelled to, and did, pay the said interest due on the said mortgage.

"(7) That on or about the 5th day of April, 1909, the said Clarence Fifield and Viola Fifield, his wife, conveyed to the plaintiff herein by deed, the land hereinbefore described, together with the other land covered by and embraced in the said mortgage made by said Clarence Fifield and Viola Fifield to the Investors' Mortgage Security Company, subject to the said contract made between the said Clarence Fifield and Viola Fifield, his wife, and defendant Ada L. Bailey and with all their rights under the said contract, which deed was on April 7, 1909, filed in the office of the county auditor of Adams county, Washington, and recorded in Book 15 of Deeds, at page 578, and that defendants had due notice of the execution and delivery of said deed.

"(8) That the plaintiff succeeded to and is entitled to all the rights and privileges of the said Clarence Fifield and Viola Fifield, his wife, in the above described real estate, and the contract for the sale thereof, as hereinbefore set forth.

"(9) That defendants had not on the 5th day of April, 1909, nor at the time they had notice of the execution and delivery of the said deed, paid to the said Clarence Fifield or Viola Fifield, his wife, the interest upon said mortgage, to be paid by them on December 1, 1908, according to the terms and conditions of the said contract.

"(10) That on or about the time of the execution and delivery of the said deed by said Clarence Fifield and Viola Fifield, his wife, to plaintiff, plaintiff verbally extended the time of payment of the said sum then due from defendants under said contract to November 1, 1909.

"(11) That on or about October 25, 1909, plaintiff notified defendants that if the payment of said interest then due and unpaid under the said contract was not made on or before November 1, 1909, plaintiff would elect to declare the said contract forfeited by defendants.

"(12) That defendants failed, neglected and refused to pay plaintiff the said sum on or before November 1, 1909,

and still fail, neglect and refuse to pay the same, or any part thereof; that defendants have not paid the said sum to plaintiff, or to said Clarence Fifield and Viola Fifield, his wife."

Upon these findings of fact the court concluded that the defendants were entitled to a decree dismissing the action.

The only question presented is whether the plaintiff in this case as assignee of the Fifields had a right to declare a forfeiture for the nonpayment of the interest payment due December 1, 1908, and thereafter extended to November 1, 1909. It was the theory of the trial court that, the interest having been paid by the Fifields at the time they sold the land and their interest in the contract to the plaintiff, the right to recover the amount so paid did not pass to the plaintiff under the assignment, but remained as a chose in action in the Fifields. This conclusion cannot be sustained. The payment was not a voluntary payment, but was made in defense of the title, and the finding of the court that plaintiff had succeeded to all the rights and privileges of the Fifields in the real estate and in the contract is sufficient, when coupled with the following allegation in the complaint: "Clarence Fifield and Viola Fifield, his wife, conveyed to plaintiff by deed the real estate hereinbefore described, subject to the said contract, and with all their rights thereunder and payments due, or to become due thereon," which is admitted in the answer, to carry with it the right to collect all sums due under the contract or paid in defense of the title or thereafter to become due, and to declare a forfeiture for the nonpayment thereof. There being a clear default on the part of the respondents, and the appellant having declared a forfeiture in the manner sanctioned by this court (*Sleeper v. Bragdon*, 45 Wash. 562, 88 Pac. 1036; *Voight v. Fidelity Ins. Co.*, 49 Wash. 612, 96 Pac. 162; *Garvey v. Barkley*, 56 Wash. 24, 104 Pac. 1108), he is entitled to his remedy.

Judgment reversed, and cause remanded with instructions to enter a decree upon the findings in favor of the appellant.

DUNBAR, C. J., CROW, and MORRIS, JJ., concur.

[No. 9296. Department Two. March 3, 1911.]

PHILIP GOTTSCHALK, *Executor etc., Respondent*, v. ALLEN MEISENHEIMER, *Appellant*.[1]

APPEAL—REVIEW—HARMLESS ERROR—PLEADINGS. After a trial on the merits in an action tried to the court without reference to technical rulings on the pleadings, assignments of error on such rulings will not be reviewed.

VENDOR AND PURCHASER—FORFEITURE—NOTICE—NECESSITY—TENDER OF PAYMENTS—TIME FOR. Where a vendee in default was given an alternative notice to pay up on or before a certain date or the contract "will be forfeited," a tender of all sums due, made before formal notice of forfeiture, although after the date fixed, is in time and entitles the vendee to performance on the part of the vendor.

VENDOR AND PURCHASER—CONTRACTS—AGREEMENT FOR WARRANTY—PASSING TITLE THROUGH THIRD PERSON. A vendor agreeing to execute or cause to be executed a good and sufficient warranty deed cannot convey or assign his rights to a third person, and compel the vendee to accept a warranty deed from such person; and it is immaterial that the legal title was held in trust for him by still another party at the time his contract of sale was made.

SAME — FORFEITURE — DEFAULTS — WAIVER—TENDER BY VENDOR. Where the vendor has allowed all the payments on a contract of sale to become past due, he cannot declare a forfeiture of the contract without tendering a deed and performance on his part.

TENDER—OBJECTIONS—ESTOPPEL. The refusal of a tender on the ground that it was not made in time, precludes the party from subsequently objecting that it was not sufficient in amount.

VENDOR AND PURCHASER—FORFEITURE—DEMAND—TENDER—AMOUNT DUE. Upon an alternative notice by a vendor asserting a default and requiring the vendee to pay in full or forfeiture would be declared, upon a tender of the full amount before forfeiture, the full amount becomes due *ipso facto*.

Appeal from a judgment of the superior court for Grant county, Steiner, J., entered August 20, 1910, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on contract. Affirmed.

[1]Reported in 113 Pac. 765; 115 Pac. 79.

Merritt, Oswald & Merritt, for appellant.

W. E. Southard, for respondent.

CHADWICK, J.—In September, 1899, defendant, Allen Meisenheimer, with three others, one of whom was C. F. Clodius, entered into a contract *inter sese*, wherein it was agreed that they would purchase certain railroad lands of the Northern Pacific Railway Company. The contract with the railroad company was made in the name of C. F. Clodius, and upon its fulfillment the railroad company deeded the lands to C. F. Clodius, the title passing from the company on October 10, 1904. On the 30th day of January, 1903, Christian Gottschalk entered into a written contract with appellant for the purchase of a fractional section of land. He paid the sum of $200 on the execution of the contract, and agreed to pay the remainder in annual payments running from November 1, 1903, to November 1, 1909. Following the execution of the contract, Christian Gottschalk entered into possession of the land, and from that time he made no payments thereon. To the readers of the opinions of this court it may be superfluous to say that the appellant, after the execution of the contract with Clodius et al., and during the life of the contract which is before us, became somewhat involved in his matrimonial affairs. The history of his ventures is in part recited in the case of *Meisenheimer v. Meisenheimer*, 55 Wash. 32, 104 Pac. 159, 133 Am. St. 1005, and *Cash v. Meisenheimer*, 53 Wash. 576, 102 Pac. 429.

For reasons which, for the sake of the argument which is to follow, we may assume grew out of his matrimonial troubles, the appellant, upon division of the Northern Pacific lands with his co-owners, caused a conveyance to be executed by Clodius to Maud Motley, afterwards Meisenheimer, who on the 11th day of September, 1908, served a notice upon Christian Gottschalk and his wife, asserting that she was the owner and holder of the executory contract of sale executed by Gottschalk, asserting the default in the several payments due

thereon, and notifying the Gottschalks that, "unless said sums so due as above set out and enumerated are fully paid by you on or before the first day of October, 1908, said contract will be forfeited by me and declared at an end, and you will forfeit all rights therein and to the real estate described therein and all sums you have paid upon said real estate under said contract and any improvements which you have made or placed upon said premises." The Gottschalks did not meet this demand within the time limited, but on the 10th day of October, they did tender to appellant the full amount due, with accumulated interest, and demanded a deed. The tender and demand were refused, upon the ground that they came too late. On October 12, 1908, Maud Meisenheimer returned the notes which Gottschalk had executed for the several payments due under the contract, and therewith notified the Gottschalks in writing that, "by reason of your failure to make the payments as provided in that certain land contract bearing date January 30, 1903, by and between Allen Meisenheimer, party of the first part, and Christian Gottschalk, the party of the second part, . . . the undersigned, to whom the aforesaid land contract and the aforesaid real estate has been transferred and conveyed, has heretofore declared all your right, title and interest in and to said contract and said land therein described forfeited, together with the payments theretofore made;" and demanded a surrender of the possession of the property. On October 15, 1908, Maud Motley Meisenheimer commenced an action against Gottschalk and his wife for the forfeiture of their rights. On October 17, this action was commenced by Christian Gottschalk, who has since died, the action being prosecuted by his executor, respondent herein. A demurrer to the complaint was overruled, and a demurrer to certain affirmative matter set up by the appellant was sustained. These rulings are assigned as error.

We think the demurrer to the complaint was properly overruled, and inasmuch as the case seems to have been tried upon its merits without reference to the technical ruling of

the court upon the answer, we feel justified in holding that these assignments are not well taken. Other assignments go to the merits of the case, and rest upon exceptions to the findings and to the refusal of the court to enter certain other findings.

This action was brought to recover damages for a breach of an executory contract to convey, and a recovery was allowed upon the theory that appellant had defaulted and was answerable for the damages sustained by his vendee. Appellant insists that this case falls within, and is controlled by the rule announced in *Cash v. Meisenheimer*, *supra*, and *Catterson v. Ireland*, 60 Wash. 208, 110 Pac. 1002, and that respondent is without remedy because of the default of his testator. It was held in the cases noted that the vendee could not recover because of his defaults. But it will be noticed that this court said in the *Cash* case:

"The basis of recovery in the action is that the respondent [Cash] himself was not in default, and that the appellant was in default. The complaint alleged facts showing such basis. But the evidence of the respondent showed conclusively that he was in default at the time of the forfeiture."

In the *Catterson* case, we said:

"The respondent made the cash payment provided for on the delivery of the agreement and entered into possession of the property, but failed to comply with his contract in any other particular. . . . Nor do we think the statement of the appellants, to the effect that they would not accept payment in full of the amount due on the contract, amounted to a waiver of a tender of the money. This was a law action for the breach of a contract, and the appellants have a right to rely on the legal rules governing tenders, and to insist that the respondent show a compliance therewith before they can be put in default."

Now, in this case, although Gottschalk was in default in the payment of his notes, he was not, by reason of his tender, in default on his contract. We have held that a forfeiture in such cases is not worked by merely defaulting in payments,

but that the forfeiture must be declared by some appropriate notice to the vendee. Or, if we concede that Gottschalk was in default, appellant is not in a position to assert a forfeiture. He relies upon, and is bound by, the conduct of Maud Meisenheimer, the holder of the legal title, and when she gave an alternative notice of forfeiture, Gottschalk would have until the time fixed therein and until the forfeiture was formally claimed to meet the demand of the notice. Appellant seems to have acted upon this theory when he caused Maud Motley Meisenheimer to give the second notice or, as it may be called, the formal notice of forfeiture and demand for possession. In the meantime a tender had been made to appellant of the full amount due on the contract, and the default of respondent's testator, if any, was thus relieved.

This brings us to the principal, if not the controlling, question in the case: Was respondent bound to make tender to, or accept a deed from, Maud Motley Meisenheimer, who it is alleged, was at all times, prior to the notice of forfeiture, ready, able, and willing to carry out the terms of the contract? The original contract of purchase provided that appellant would, upon "the full payment of the amounts therein agreed to be paid, execute, or cause to be executed, to the party of the second part or the second party, a good and sufficient warranty deed for said premises." The rule is that:

"It is generally held that unless the contract expressly provides that the deed shall be made by a third person, it must be made by the vendor himself, even though the words of the contract are that the vendor shall execute the deed or cause it to be executed," 29 Am. & Eng. Ency. Law (2d ed.), 701.

See, also, *Hussey v. Roquemore*, 27 Ala. 281; *Rudd v. Savell*, 44 Ark. 145; *Gaar v. Lockridge*, 9 Ind. 92.

But where the vendor agrees to convey, with covenants of warranty or by warranty deed sufficient in form, he cannot satisfy his promise by passing the title through another. *Setiner v. Zwickey*, 41 Minn. 448, 43 N. W. 376; *Bigler v. Morgan*, 77 N. Y. 312; *James v. Burchell*, 82 N. Y. 108.

Appellant insists that these general rules cannot apply here because, at the time the original contract was entered into, the title did not rest in the name of appellant, but in that of his co-owner, Clodius, and that a fair reading of the authorities will show that it has never been applied in such cases. But we cannot distinguish this case from the general rules, for we may well presume—if indeed we are not so compelled—that the inducement of the contract was the promised covenants of warranty. Although Clodius may have conveyed the bare legal title, if it still rested in him at the time of the tender, it would nevertheless have been the duty of the appellant, if Gottschalk insisted upon it, to convey his equitable title laden with his promised warranties. *Crabtree v. Levings*, 53 Ill. 526. Or, if it be held that Gottschalk would be bound to receive the deed of Clodius, who held the title and of which fact he may have had notice, it does not follow that appellant could cause a deed to be executed by Clodius to a third party and compel the acceptance of such title by his vendee, for the warranty of one man may be acceptable while that of another may be deemed worthless. In *Miner v. Hilton*, 15 App. Div. 55, 44 N. Y. Supp. 155, it is said:

"In *James v. Burchell*, 82 N. Y. 108, the contract in question contained a like provision, that the plaintiffs agreed to 'convey, or cause to be conveyed,' to the defendant the premises in fee by a full covenant warranty deed. The plaintiffs conveyed the premises to another. It was held that this, under the circumstances of the case, relieved the defendant from further performance of the contract, and in the opinion of the court it was said that some stress was laid upon the provision in the contract, that the plaintiffs 'agreed to sell and convey, or cause to be conveyed.' This, it was held, was not controlling, and that the testimony showed that the defendant did not intend to accept any other warranty than that of the plaintiffs. It is reasonable to suppose that usually, when a vendee takes a contract containing a provision for conveyance with covenants of warranty, he has in view the responsibility of his vendor, unless something appears to the

contrary in the contract. The provision that the vendor will do it, or cause it to be done, as expressed in the contract in question, does not, I think, indicate a purpose to enable him to relieve himself from making the covenant by the substitution of such other person as he may choose to take the relation of grantor and covenantor."

At any rate, in such cases it should be held to be optional with the vendees; and being so, it is not for this court to compel a situation which, looking to the whole transaction, it is apparent they sought to avoid in the beginning and refused to accept in the end.

From what we have said it follows that the judgment of the lower court can be sustained upon another ground. While appellant could allow one or all of the payments to become delinquent and not lose his right of forfeiture (*Reddish v. Smith*, 10 Wash. 178, 38 Pac. 1003, 45 Am. St. 781), he cannot gain an advantage over his adversary where he allows all of them to become delinquent without a declaration of his rights. Gottschalk was remiss, but appellant was apparently content that he should be so. His declaration of forfeiture is based upon the default of the last payment as well as the first. The whole sum was due and a deed forthcoming. By the first notice of forfeiture he treated the contract as still in force, and through Maud Motley Meisenheimer declared his ability to perform. This brings him within the rule of *Stein v. Waddell*, 37 Wash. 634, 80 Pac. 184, and kindred cases collected in *Reese v. Westfield*, 56 Wash. 415, 105 Pac. 837, and made it incumbent on him to not only tender a deed from the holder of the legal title, but demonstrate his own ability to perform. He did neither, and Gottschalk was not deprived of his legal rights.

Respondent might, in our judgment, have compelled a specific performance, but he is content to claim his damages. These the court assessed at $1,870, being some little less than the value of the improvements as claimed by respondent. We

think the action to be well founded in law, and the judgment of the lower court sustained by the testimony.

Affirmed.

DUNBAR, C. J., CROW, and MORRIS, JJ., concur.

ON PETITION FOR REHEARING.

[Decided April 24, 1911.]

PER CURIAM.—A petition for rehearing has been filed herein, in which it is contended that the court has wrongfully applied the former decisions of this court, in that, in this case, all of the payments were not due on the contract at the time the first notice of forfeiture was given, and hence, there was no duty incumbent on Meisenheimer to tender a deed.

We cannot agree with this contention. Before taking up that feature of the case, we held that because of the personal covenants of Meisenheimer, the notice of forfeiture given by Maud Motley Meisenheimer was ineffectual to work a forfeiture of the contract. Our decision might have been made to rest upon this ground alone, but because we found the whole of the purchase price to be due, we went further and put our decision upon the additional ground, that where the covenants of an executory contract were mutual and dependent, that a forfeiture could not be declared without a tender of the deed. It is said:

"It is unquestionably the law that if all the payments are due, the vendor must tender performance before he can put the vendee in default. If all the payments had been due we certainly would have tendered a deed with the declaration of forfeiture.

"The last two payments being not yet due, that rule does not apply here. Until November 1st, 1909, total payment could not be required nor was conveyance required.

"The making of intermediate payments was not concurrent with making the deed."

The record in this case shows that one Lambert, acting for Gottschalk, and after the ineffectual declaration of forfeiture had been made, tendered the sum of $4,344.83 and demanded

a deed. He further testifies that no objection was made to the amount of the tender, that it was refused solely because it came too late. This, under a well settled rule of law, would estop Meisenheimer from claiming that the amount was insufficient. At the time the contract was executed, there was a balance due of $2,985. Tender was made five years, eight months and ten days after the execution of the contract. The interest for that time at eight per cent amounts to $1,359.83, or a total of $4,344.83. Our remark in the former opinion, "His declaration of forfeiture is based upon the default of the last payment as well as the first, the whole sum was due and a deed forthcoming," may be misleading; but when considered in connection with our holding that Maud Motley Meisenheimer could not forfeit the contract, or relieve Meisenheimer of his covenants, it seems clear to us Gottschalk had the right to tender all payments "on or before" the due date, and when he did make the tender, the full amount became due *ipso facto*. He thus put the burden on Meisenheimer, who could not escape liability by reference to the act of Maud Motley Meisenheimer, who admittedly was in no position to carry out the contract.

Meisenheimer now relies upon the first declaration of forfeiture, but it is evident that when making up his case he did not rely upon that alone. It was in the alternative; it declared that if payment was not made as demanded, "Said contract will be forfeited and declared at an end." All notes were retained, and no attempt was made to assert a forfeiture by positive declaration or return of the notes given to evidence the deferred payments until October 12, 1908, two days after Gottschalk had tendered the full amount due and was entitled to his deed. Whether an alternative declaration of forfeiture, under a contract where notes collateral thereto had been executed, would forfeit the rights of the vendee until the notes had been tendered back was not decided by us, nor do we now pass upon that question. There are cases holding that it cannot be done. *Comstock v. Brosseau*, 65 Ill.

39. It is enough when it appears that no notice sufficient to satisfy the law had been given at the time the tender was made. By the terms of the contract, a tender being made before any legal forfeiture occurred, the whole purchase price became due and Gottschalk was entitled to his deed. Our decision is that there was no forfeiture; that a tender was made in time; that a deed was forthcoming; that Gottschalk was not bound to pay one who could not perform; that he might have had specific performance; and waiving that remedy, he could recover his damages. Rehearing denied.

[No. 9187. Department One. March 3, 1911.]

W. M. YUNDT, *Respondent*, v. SCHULTZ-DEGGINGER COMPANY, *Appellant*.[1]

MECHANICS' LIENS — CONTRACT — ORDER — GUARANTY — BREACH. Where plaintiff failed to install heating apparatus in compliance with its guaranty, it cannot claim a mechanics' lien for a pump necessarily installed to correct the defect, ordered by the defendant after conferring on the matter, although nothing was said about who was to pay for the pump, it not being claimed that the pump was not a reasonable and the cheapest remedy for the defect.

Appeal from a judgment of the superior court for King county, Frater, J., entered July 12, 1910, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to foreclose a mechanics' lien. Reversed.

Leopold M. Stern (*J. W. Russell* and *W. H. B. Thomas*, of counsel), for appellant.

Keenan & Hardinger, for respondent.

DUNBAR, C. J.—This is an action for the foreclosure of a mechanics' lien on the premises of the appellant in Seattle, King county, Washington. The complaint alleged that the

[1]Reported in 113 Pac. 760.

plaintiff sold and delivered to defendant $99 worth of material, and did $18.50 worth of work in installing the same in an apartment house belonging to it; contained the usual allegations of a complaint for the foreclosure of a mechanics' lien; and prayed for judgment. The answer admitted the ownership of the land, and put in issue all the other allegations of the complaint. It contained an affirmative defense, wherein it was alleged that the plaintiff took the contract to install a steam-heating apparatus in the house in question, and guaranteed that the same would heat the house to a certain temperature; that plaintiff did install the heating plant; that the defendant had paid the full contract price therefor; that the said apparatus failed to heat the house as provided in said contract of guaranty; and that the plaintiff furnished the materials and did the work for which the lien was claimed for the purpose of making good the said guaranty. The reply denied the allegations of defendant's affirmative answer.

It appears from the testimony, and indeed it is not questioned by the respondent, that the affirmative matters set forth in the answer of the appellant are substantially true. It was proven, and not denied, that the respondent had taken the contract to install the heating plant mentioned in the answer, and that in the contract was incorporated the following guaranty:

"When the apparatus herein proposed is finished in accordance with the above specifications, I guarantee that it will heat all rooms and halls in which radiators are set to a temperature of seventy degrees in the coldest weather."

This plant was installed and, upon its completion, the appellant paid the contract price, to wit, $2,705. The court in this case seems to have ignored altogether the affirmative answer of the appellant, and made findings of fact on matters which were not in issue, viz., the fact that the respondent had furnished and installed the pump for which the lien was claimed. This fact was candidly admitted by the respondent, but his claim is, as we have indicated, that this work was done

and this pump installed for the purpose of remedying the defect in the apparatus placed in the building under the first contract; and the insistence is that it was the respondent's duty to remedy such defect, and that the appellant is not obligated to him for the cost of such remedy. That the provisions of the guaranty were not complied with was testified to by the appellant and by two other competent witnesses, and is not denied by any one, the respondent satisfying himself with the statement that he had been ordered by the appellant to send for and install this pump, and that he had done so.

From the testimony it appears that it was absolutely impossible to heat the rooms in the building with the original apparatus, the president of appellant company testifying that it worked all right when it was first tested, and believing it to be all right, he paid the contract price; but that when the cold weather came it would not heat the house; that in some of the radiators one coil would heat and the balance remain cold, and in others, two or three of the coils would heat and the balance remain cold, and that the temperature was nowhere near seventy degrees; that it was so cold that the tenants threatened to leave, and some of them did move out. He also testified that he called the attention of the respondent to the matter, and called in another steam-heating man to examine it, and that upon such examination it developed that the discharge pipes were trapped so that the cold water in the radiators could not be forced out, and that if an exhaust pump was put in to exhaust the water from the discharge pipes, it would heat all right; that something had to be done right away, and that he told the respondent to put in the pump; that when the pump was put in and started, it pumped the water out of the discharge pipes, and the heating apparatus worked all right, heated all the coils in the radiators, and heated the whole building, in compliance with the contract. It is true there did not seem to have been any great amount of talk between the appellant and the respondent on the subject. It appears, however, that the attention of the respond-

ent was called to the defect; that he gave the appellant a catalogue containing a description of pumps; that the appellant examined this catalogue and told him to send for and install this particular pump, and that there was nothing said at that time about who should pay for it.

The main contention of the respondent is based upon the fact that the appellant ordered this pump. There is no question but that the appellant told the respondent to send for the pump, but that does not militate against its contention, for it could have sent for it itself and could have installed it itself, or had it installed by some other mechanic, or it could have remedied the defect in any way which was practicable and reasonable and have had recourse on the respondent, or it could have sued the respondent for damages for failure to comply with the contract under the terms of the warranty; and the fact that it did not do very much talking about it does not deprive it of any right which it had under the warranty. It had called the attention of the respondent to the defect, and had consulted about the remedy. It might be that, if the appellant had insisted upon having the defect remedied in some particular way, as by the installment of this pump, and that it had failed to remedy the defect, it would be held responsible for having chosen an unreasonable remedy. But there is no attempt here to show that the remedy was not a reasonable one, or in fact that it was not the cheapest and best remedy available. Certain it is that the conditions of the guaranty were not complied with. It is just as certain that it was the duty of the respondent to make good his contract, and that it has been made good by the installment of this pump. Under such circumstances it would seem that the appellant should not be held liable for the correction of a mistake made by the respondent, and that no lien should attach.

The judgment is reversed, with instructions to dismiss the action.

MOUNT, PARKER, FULLERTON, and GOSE, JJ., concur.

[No. 9386. *En Banc.* March 3, 1911.]

F. J. WALKER, *Appellant*, v. THE CITY OF SPOKANE *et al.*, *Respondents.*[1]

MUNICIPAL CORPORATIONS—CHARTERS—STATUTES—CONFLICT. Charters adopted by cities of the first class are subject to and controlled by general laws, and this is the only constitutional restriction therein.

STATUTES—REPEAL—MUNICIPAL CORPORATIONS—LEGISLATIVE POWERS—CHARTERS—CONSTRUCTION. Rem. & Bal. Code, § 7504, authorizing electors of cities of the first class to frame and adopt a city charter, does not repeal Rem. & Bal. Code, § 7517, providing that the legislative powers of such city shall be vested in a mayor and city council, although it modifies and grants larger and more extensive legislative powers than those granted by § 7517.

MUNICIPAL CORPORATIONS—CHARTERS—GOVERNMENTAL POWERS—COMMISSION FORM OF GOVERNMENT—STATUTES—CONSTRUCTION. Under Rem. & Bal. Code, § 7517, providing that the legislative powers of a city of the first class shall be vested in a mayor and city council with such duties as may be prescribed in its charter, and Id., § 7518, providing that such city adopting a charter shall have all the powers now or hereafter conferred upon cities and towns by the laws of the state, and such as are usually exercised by municipal corporations, and Id., § 7504, providing that the voters may amend the charter in any matter within the realm of local affairs or municipal business, a city may adopt the commission form of government vesting all legislative and executive power in five commissioners who shall constitute the council, one of whom shall be mayor, each to be in charge of an independent department; since the same does not go beyond the realms of local affairs and municipal business.

STATUTES—CONSTRUCTION—EQUITABLE CONSTRUCTION. Equitable construction of statutes, while tolerated in remedial statutes with great caution, should not be extended to regulations of public policy, and if the language is plain and free from ambiguity, inconvenience in its enforcement can have no weight in its construction.

MUNICIPAL CORPORATIONS—OFFICERS—MAYOR—POWERS—STATUTES. Rem. & Bal. Code, § 7517, providing that the legislative powers of cities of the first class shall be vested in a mayor and city council, without limiting or specifying his duties as an executive officer, does not imply that the mayor must be an officer possessed of the distinguishing characteristics of a mayor, or that he shall be an

[1]Reported in 113 Pac. 775.

executive officer, since other mandatory provisions of the statutes are to the effect that he shall perform the duties prescribed by the charter.

CONSTITUTIONAL LAW—GUARANTIES—REPUBLICAN FORM OF GOVERNMENT—MUNICIPAL CORPORATIONS—CHARTERS. A city charter establishing the commission form of government, with the initiative, referendum, and recall does not abolish the republican form of government guaranteed by art. 4, § 4, of the Federal constitution; since the guarantee applies only to the state governments, and means only a representative form of government subject to the will of the people.

MUNICIPAL CORPORATIONS—CHARTERS—COMMISSION FORM OF GOVERNMENT—INITIATIVE AND REFERENDUM. The only limitation on the powers of a city government to enact laws through the medium of a charter is that they shall be in accordance with general laws, and a charter establishing the commission form of government, with the initiative, referendum, and recall does not violate any statutory law.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered February 3, 1911, upon the pleadings by stipulation of counsel, after sustaining a demurrer to the complaint, dismissing an action to enjoin the holding of an election to elect municipal commissioners. Affirmed.

Turner & Geraghty, for appellant.

Fred B. Morrill, Burcham & Blair, and *H. M. Stephens*, for respondents.

DUNBAR, C. J.—The only question in this case arises on the complaint, the defendant having filed a demurrer to the complaint as well as an answer, and the parties having stipulated in open court that the answer be not taken as waiving the demurrer, and that the court might render judgment on the pleadings as they stood. Plaintiff consented to this method of disposition because the answer failed to deny any material allegation of the complaint. The demurrer to the complaint was sustained, and from the judgment following, this appeal is taken.

The complaint, in brief, is to the effect that an election was

held on the 27th day of September, 1910, by the qualified electors of the city of Spokane, at which were chosen fifteen freeholders to prepare a new charter, and that on the 11th day of November, 1910, said body of freeholders filed with the clerk of said city the so-called new charter. The charter is set forth in the complaint and made a part of the same. It is alleged that the so-called charter undertakes to, and does in substance and in fact, abolish the office of mayor of the city of Spokane and the council of the city of Spokane, and undertakes to substitute in place of said mayor and council five commissioners in whom is reposed all municipal power, both legislative and executive; also abolishes the provisions of the city charter in force, providing for the election by the qualified electors of the city of the mayor and council, and also undertakes to abolish and do away with the provisions of the charter then and theretofore in effect, dividing the municipal power of the city between legislative and executive departments, each independent of the other; all of which it is alleged is contrary to the laws of the state of Washington. Many other allegations are made in the complaint, but these are sufficient to raise the questions discussed. The prayer was for a restraining order, to prevent the calling, advertising, and holding of an election for the election of the commissioners provided for in the charter, and to prevent the abdication of the officers now in power.

The charter provides that all the power in the city, unless otherwise provided by the charter, shall be exercised by, through, and under the direction of five commissioners, who shall constitute the council and one of whom shall be mayor; and that the commissioners and council shall be subject to the order and direction of the people at all times by the initiative, referendum, and recall, provided for in the charter. It provides that each commissioner shall be entitled to a vote; that the mayor shall not have any veto power; and that the executive and administrative powers, authority, and duties, not otherwise provided therein, shall be distributed among five

departments, as follows; department of public affairs, department of finance, department of public safety, department of public works, and department of public utilities; that such distribution among the various departments shall be made and may be changed by ordinance; that the council shall prescribe the powers of the officers and employees, etc. These provisions, we think, are sufficient to present the case.

The main contention of the appellant, as we understand it, is that § 6 of the act of 1889-90, page 223, which is § 7517 of Rem. & Bal. Code, and which act provided for the government of cities of the first class, provided for a system of government which contemplated an executive and a legislative department, the mayor to be invested with certain executive powers separate and distinct from the powers conferred upon the council; and that the charter under discussion violates this provision of the law by merging the executive and the legislative powers of the city officers, thereby stripping the executive head—the mayor—of any distinct, executive powers. It may be conceded from the outset that, while cities of the first class have the constitutional right to frame their own charters, the charters so framed are subject to, and controlled by, general laws. Const., art 11, § 10. And this is all the constitutional limitation that there is. So that it becomes our duty to see if any of the provisions of the charter are in contravention of any legislative enactment. That portion of § 6 of the act of 1889-90 (Rem. & Bal. Code, § 7517), pertinent to this inquiry, is as follows:

"The legislative powers of any city, organized under the provisions of this act, shall be vested in a mayor and a city council, to consist of such number of members, and to have such powers, as may be provided for in its charter, who, together with such other elective officers as may be provided for in such charter, shall be elected at the times, in such manner, and for such terms, and shall perform such duties and receive such compensation, as may be prescribed in such charter."

Section 7 of the same act (Rem. & Bal. Code, § 7518), is as follows:

"Any city adopting a charter under the provisions of this act shall have all the powers which are now or may hereafter be conferred upon incorporated towns and cities by the laws of this state, and all such powers as are usually exercised by municipal corporations of like character and degree, whether the same shall be specifically enumerated in this act or not."

Section 1 of chapter 186 of the Laws of 1903, page 393 (Rem. & Bal. Code, § 7504), an act providing for direct amendments of city charters, is as follows:

"On petition of a number (equal to fifteen per cent of the total number of votes cast at the last preceding municipal election) of qualified voters of any municipality having adopted a charter under the laws of this state, asking the adoption of a specified charter amendment, providing for any matter within the realm of local affairs, or municipal business, the said amendment shall be submitted to the voters at the next regular municipal election, occurring thirty days or more after said petition is filed, and if approved by a majority of the local electors of the municipality voting upon it, such amendment shall become a part of the charter organic law governing such municipality."

It is contended by the respondents that this section repeals § 7517 of Rem. & Bal. Code, and that it has been so decided by this court in *Hindman v. Boyd*, 42 Wash. 17, 84 Pac. 609, and in *Hartig v. Seattle*, 53 Wash. 432, 102 Pac. 408. It is insisted by the learned counsel for appellant that the language used in the latter case, to the effect that *Hindman v. Boyd* held that the act of 1903 repealed by implication § 7517, *supra*, was too broad, and upon further examination and reflection we are compelled to admit the justice of the criticism. But notwithstanding this, it is obvious that the *rationale* of the decision in *Hindman v. Boyd* was to hold § 7517 repealed to the extent of granting larger and more extensive powers to the city government, and that the limitation in the former law, to the effect that the legislative powers should be vested in

a mayor and a city council, had been modified. Speaking to this question the court said:

"It is practically conceded by appellants that, if the statute, § 740 [7517] *supra*, were not in existence, it would lie with the people to discharge legislative functions. It is contended, however, that the statute is in full force, and that it is prohibitive of legislation in any manner except by the mayor and council. It is argued that the act of 1903 in no way affects the provisions of said § 740. It is true the act does not refer to the former statute, but if it reaches the same subject it should be held to affect the older statute in so far as it treats of the same subject. The later act provides that charters may be amended in the manner outlined, 'providing for any matter within the realm of local affairs or municipal business.' The terms could not be broader and, if the former statute can be said to have vested the power to legislate with respect to franchises exclusively in the mayor and council, the later one authorizes the people to reserve that power to themselves, since they may amend the charter providing for any matter 'within the realm of local affairs.'"

Under this decision and the broad powers conferred by the statute which was held to apply, it cannot be contended that the charter provisions complained of in this case go beyond the realms of local affairs or municipal business. It is, however, contended by the appellant that the phraseology employed should, in the interest of moderation, receive judicial construction; that it is the duty of courts to construe legislative acts so as to effectuate legislative intention; to confine broad language, going beyond legislative intention, within narrow limits; and to extend language, not coming fully up to the legislative intention, to a broader application, in order that the will of the law-making power may be effectuated. Undoubtedly it is true that the central idea should be to effectuate the legislative intention. But to discover that intention is a difficult proposition. It seems to us that the canons of construction recommended by the learned counsel are so flexible, and the powers conferred upon the court so

unhampered, that there would be great danger that the intent of the legislature would too frequently be found to be simply a reflection of the views of the court on the question of the public policy involved in the act construed, which would in reality be a usurpation of the legislative functions. Some authorities and courts, especially the English courts, have recognized what they are pleased to term an equitable construction; but it is the consensus of judicial opinion that, while equitable construction may be tolerated in remedial statutes, it should always be resorted to with great caution, and never extended to mere arbitrary regulations of matters of public policy. When the language of the act is plain, free from ambiguity, and devoid of uncertainty, it is unanimously held that there is no room for construction, and that inconvenience following the enforcement of the law as expressed can have no weight in the construction of the statute.

Sedgwick on Constr. Stats. & Const. Law (2d ed.), p. 265, in discussing this question, says:

"Of those rules of construction, none can be more dangerous than that which, distinguishing between the intent and the words of the legislature, declares, that a case not within the meaning of a statute according to the opinion of the judges, shall not be embraced within the operation of statute, although it is clearly within the words; or, *vice versa*, that a case within the meaning, though not within the words, shall be embraced. We should invariably deem it our duty to defer to the expression of the legislature, to the letter of the statute, when free from ambiguity and doubt, without indulging in speculations, either upon the impropriety or hardship of laws."

But we think the position of the appellant is untenable, even under the provisions of § 7517. There is nothing in that section which undertakes to specify or limit the duties of a mayor as an executive officer. In fact, he is not even described as an executive officer, but as a legislative officer; and the objection to the proposed charter is that it in reality makes nothing of him but a legislative officer. It is contended

by the learned counsel for appellant that, while the section does not specifically provide that the executive power shall reside in a mayor, it is necessarily implied by the mention of that official; that if no function other than acting in conjunction with the city council in matters of legislation was intended to be performed by the mayor, no mention of such official would have been made, and the mandate of the law would have been simply that the legislative power of the city should be vested in a city council. Hence, it is necessarily implied that cities of the first class are each to have a mayor possessing the distinguishing characteristics of that office. But there is no room for an implication when the plain, mandatory provisions of the statute are to the contrary. And as we have seen, § 7517 provides that the mayor and council shall have such powers as may be provided for in its charter, and that they shall perform such duties and receive such compensation as may be prescribed in such charter.

It is further contended that the matter does not rest on implication alone, because § 7 of the act of 1889-90 (Rem. & Bal. Code, § 7518), above quoted, confers on cities of the first class powers which are now, or may hereafter be, conferred upon incorporated towns and cities by the laws of this state; and as to towns and cities of the second and third classes, it is found that each of them is provided with a mayor, and the powers of that functionary are clearly defined. It seems to us that, instead of this proving the theory contended for by the appellant, it tends to strengthen the opposite theory, viz., that larger powers were intended to be conferred upon cities of the first class than upon cities of the second class, and that cities of the first class are, therefore, not subject to the limitations imposed by the law quoted, upon towns and cities of the second and third classes.

It does not necessarily follow, from the fact that the statute provides that the legislative powers of the cities of the first class shall be vested in a mayor and city council, that the

mayor is, within the contemplation of the law, an executive officer. Nor do the cases cited by counsel for appellant sustain that view. In *Cochran v. McCleary*, 22 Iowa 75, which was a case embracing the right of the mayor to preside over the city council, Judge Dillon said:

"In this country the doctrine has been recognized that corporations, public or private, could be created only by act of the legislature, and they and their officers had and could exercise only the powers granted to them either expressly or by implication."

Inasmuch as our statute sees fit to relegate to the charter the enumerating and conferring of the powers upon the mayor and the councilmen, it would seem, under the theories of the case cited, that there is where the power would rest. In *Waldo v. Wallace*, 12 Ind. 569, it was held that the mayor of a city, organized under the general laws of 1857, was a judicial officer within the meaning of that constitutional provision, if, at the time of his election, no order had been made by the city council for the election of a city judge and no such judge had been elected, and that the statute conferring judicial powers upon the mayor of a city was not unconstitutional; and that was the real question in the case. In the discussion of the case, however, it was said that the powers and duties of a mayor or other head officers of a corporation depend, in general, upon the provisions of charters, or prescriptive usage of the corporation, or express provisions of an act of parliament; but that the power and authority which mayors possess, being given to them by local regulations, vary in different places. So that it repudiates the idea that a mayor has, by virtue of his position as mayor, any executive or other authority which is not conferred upon him by the legislature or by the charter under legislative direction. Bouvier, in describing a mayor, says:

"It is generally his duty to cause the laws of the city to be enforced, and to superintend inferior officers, such as constables, watchmen, and the like. But the power and au-

thority which mayors possess, being given to them by local regulations, vary in different places."

Anderson's definition is:

"The chief or executive magistrate of a city. His principal duty is to enforce the laws of the city. He may also preside over the mayor's court, which has jurisdiction, concurring with the courts of other committing magistrates, over offenses perpetrated within the city limits, and of special matters given by statute."

So that it will be seen that his duties may be legislative, executive, or judicial, according to the law in force in his jurisdiction. The state law nowhere confers upon the mayor the right of veto. He does not possess it unless it is conferred by charter.

Something has been said to the effect that this charter cannot be sustained under the republican form of government guaranteed to the states by the Federal constitution. Section 4, art. 4, of that document provides:

"The United States shall guarantee to every state in this Union a republican form of government, and shall protect each of them against invasion; . . ."

In addition to the fact that this guaranty applies only to a state government, it means only such a government as is under the control of the people; or, in other words, a representative government. At the time of that enactment, there was no thought of an encroachment on the part of the people, and consequently no attempt to guard against it. The apprehension was exactly the reverse. It was on encroachment upon the rights of the people which the fathers sought to prevent; and it would be impossible to violate the spirit of that provision by enlarging the representative powers of the people. The distinction between a democratic form of government and a republican form of government, in the sense in which the term is used in the Federal constitution, is more theoretical than real, for the vital idea in both is a

government by the people; and whether the will of the people be expressed through a representative or through a personal announcement, it is but a difference in form of expression. The action of the representative must proceed upon the theory that he is expressing the will of the constituency; otherwise the theory of a republican form of government is a delusion. That the power never has been supposed to apply to minor departments of the state is shown by the form of county governments which have been provided for by so many of the states. The board of county commissioners, clothed with the authority with which they are clothed, especially in our state, is a common form of government by commission, which is universally sustained.

Sustaining the view which we have expressed with relation to the object of the constitutional guaranty, it is said by Mr. Cooley, in his work on Constitutional Limitations, page 42:

"The last provisions that we shall here notice are that the United States shall guarantee to every state a republican form of government, and that no state shall grant any title of nobility. The purpose of these is to protect a Union founded on republican principles, and composed entirely of republican members, against aristocratic and monarchical innovations."

Nor are we without the authority of cases to sustain this view. In *Eckerson v. Des Moines*, 137 Iowa 452, 115 N. W. 177, where the question of republican form of government was involved, under an act of the general assembly providing for the government of certain municipalities where the initiative and referendum was brought in question, the act was sustained; and it was held that the contention, that the constitutional guaranty which we have just mentioned ran, not alone to the state, but to the various subdivisions thereof, was not tenable; but that the purpose of the Federal constitution was to provide a form of government, republican

in character, for the states as a united whole. Said the court:

"This is manifest from the history of the times, the contemporaneous writings and public addresses, the constitutional debates, and the provisions of the instrument itself as adopted. And whatever may be the form of words employed by the lexicographers—and they are more or less varied—to define what is meant by the expression 'a republican form of government,' it is clear that it was understood by the fathers to mean a government by the people, through representatives appointed by them to the various departments—executive, legislative, and judicial, as provided—either by direct vote or through some intervening officer or body by them selected and appointed by direct vote for the purpose. Now, at the time the constitution was adopted, as it is well known, there were in existence thirteen states, each thereof supreme as related to its own domestic affairs, and in each of which the government was divided into three departments —executive, legislative, and judicial—and carried on through representatives selected from time to time by vote of the people. It is to be noted, however, that the form of local government provided for municipalities and other state subdivisions varied in the different states. In some, pure democracy obtained through the medium of the 'town meeting;' in others, boards of selectmen were chosen, etc. That the form of government in vogue in these states was republican was not made the subject of question when the Federal constitution came to be considered. No one of such states was called upon to amend its plan of government—state or municipal—to bring it into harmony with the plan proposed for the Federal government."

And this was the view expressed by this court in *Hartig v. Seattle*, *supra*, where it was said, in discussing the validity of the charter of Seattle concerning the power to provide for the initiative and referendum:

"It can scarcely be contended that this plan is inconsistent with a republican form of government, the central idea of which is a government by the people. Whether the expression of the will of the people be made directly by their own acts, or through representatives chosen by them is not material. The important consideration is a full expression."

This doctrine is based upon the distinction between the constitution of the United States and the constitutions of the different states. The constitution of the United States is a grant of power; that is to say, Congress was granted such powers only as were expressed in the grant. The remaining powers rested in the people. And when looking for the powers of Congress, we search for powers delegated. While the constitution of the state is simply a limitation upon the powers of the legislature, and all power which is not limited by the constitution inheres in the legislature as a representative body, and primarily in the people. Hence, as applied to this particular case, the only limitation on the part of the powers of the city government to enact laws through the medium of a charter is that they shall be in accordance with general laws; and the legislature, as we have seen, being the depositary of authority under the constitution, we can look for restrictions upon the rights of the people only to the general laws.

In *Brown v. Galveston*, 97 Tex. 1, 75 S. W. 488, it was held that the charter of the city of Galveston, in conferring upon the president and board of commissioners, a majority appointed by the governor, the power of governing the city, usually committed to a mayor and city council, was not void as violating article 6, section 3, of the constitution, giving all qualified electors the right to vote for a mayor and all other elective officials. Nor was it beyond the power of the legislature to enact, as being in derogation of an inherent right of local self-government by municipalities, arising by implication from history and tradition in that state. In discussing the principles involved, it was said:

" 'The legislative power of this state' means all of the power of the people which may properly be exercised in the formation of laws against which there is no inhibition expressed or implied in the fundamental law. Since a municipal corporation cannot exist except by legislative authority, can have no officer which is not provided by its charter, and can exercise no power which is not granted by the legislature, it

follows that the creation of such corporations and every provision with regard to their organization is the exercise of legislative power which inheres in the whole people, but by the constitution is delegated to the legislature; therefore, it is within the power of the legislature to determine what form of government would be most beneficial to the public and to the people of a particular community;"

citing, Cooley, Const. Lim., 205, where that author says:

"Nor are the courts at liberty to declare an act void because, in their opinion, it is opposed to a spirit supposed to pervade the constitution, but not expressed in words."

It was also held in *Greenville v. Pridmore*, 86 S. C. 442, 68 S. E. 636, that the constitutional requirement with respect to the separation of the three departments of the government refers to the state government and state officers, and not to the government of municipal corporations and their officers. In *Spartanburg v. Parris*, 85 S. C. 227, 67 S. E. 246, it was held that the constitutional provision that no person exercising the functions of one department of the government shall assume or discharge the duties of another does not apply to municipal corporations. To the same effect are: *Graham v. Roberts*, 200 Mass. 152, 85 N. E. 1009, and *Baltimore & O. R. Co. v. Town of Whiting*, 161 Ind. 228, 68 N. E. 266. There being no violation of statutory law in the proposed charter, the demurrer was properly sustained. Judgment affirmed.

ALL CONCUR.

[No. 8632. Department Two. March 4, 1911.]

THE STATE OF WASHINGTON, *Respondent*, v. RUDOLPH CRIST, *Appellant*.[1]

INDICTMENT AND INFORMATION—DEGREES OF OFFENSE—ASSAULT WITH DEADLY WEAPON. An information charging an assault with a loaded pistol with intent to murder by striking, beating, and wounding, no considerable provocation appearing therefor, supports a conviction of the lesser crime of assault with a deadly weapon with intent to commit bodily injury, no considerable provocation appearing therefor.

ASSAULT AND BATTERY—AGGRAVATED ASSAULT—DEADLY WEAPON—EVIDENCE—SUFFICIENCY. The evidence supports a conviction for assault with a deadly weapon with intent to commit bodily injury, no considerable provocation appearing therefor, under Rem. & Bal. Code, § 2746, where it appears that the accused placed a loaded pistol against the person of the prosecuting witness, threatening to kill her, and desisted only when interrupted by an officer.

Appeal from a judgment of the superior court for Yakima county, Preble, J., entered June 30, 1908, upon a trial and conviction of assault with a deadly weapon with intent to commit bodily injury. Affirmed.

Henry J. Snively, for appellant.

J. Lenox Ward and *Walker Moren*, for respondent.

CROW, J.—Upon a trial to a jury, the defendant, Rudolph Crist, was found guilty of assault with a deadly weapon with intent to commit bodily injury, no considerable provocation appearing therefor, and has appealed from the judgment and sentence entered upon the verdict.

Appellant first contends the information does not state facts sufficient to constitute a crime. The charging portion of the information upon which he was tried reads as follows:

"He, the said Rudolph Crist, on or about the 27th day of May, 1908, in the county of Yakima, state of Washington,

[1]Reported in 113 Pac. 772.

then and there being, did then and there wilfully, unlawfully, feloniously, purposely, maliciously, and with intent to kill and murder one Clara A. Hays, an assault did make in and upon the person of the said Clara A. Hays, with a deadly weapon, to wit: a pistol loaded with powder and balls, then and there had and held in the hands of the said Rudolph Crist, with which he then and there wilfully, unlawfully, feloniously, purposely, and maliciously struck, beat, and wounded the person of the said Clara A. Hays, with the intent aforesaid, no considerable provocation appearing therefor, contrary to the statute in such case made and provided, and against the peace and dignity of the state of Washington."

The allegations of this information are sufficient to sustain a verdict convicting the appellant of the lesser crime of assault with a deadly weapon with intent to commit bodily injury, no considerable provocation appearing therefor. *State v. Young*, 22 Wash. 273, 60 Pac. 650.

Appellant's next contention is that the evidence was insufficient to support the verdict. The assault alleged to have been made on Clara Hays occurred in the city of North Yakima, about midnight on May 27, 1908. The appellant and Clara Hays had been in a saloon for some hours drinking with other persons. Mrs. Hays left before the appellant did. Shortly thereafter the appellant, armed with a loaded revolver, was looking for her in the immediate neighborhood, a disreputable locality. He hailed a public hack in which two persons were passengers, stopped the driver, asked if Mrs. Hays was a passenger, looked in the hack, failed to find her, but stated that he intended to kill her and himself. Later he met Mrs. Hays on the street near a saloon. He was still armed with the loaded revolver which he carried in his hand. He called her a vile name, threatened to shoot her, thrust the revolver against her person, and told her that he was about to kill her. At this instant one Perry, a police officer, seeing appellant, called to him, "What are you doing?" Thereupon he desisted, threw the revolver toward the officer, sur-

rendered himself, and was placed under arrest. There was no evidence that he actually shot at Mrs. Hays, or that he committed any act of violence other than to thrust the revolver against her person and threaten to immediately kill her. He did these acts, desisting only when interrupted by the officer.

The appellant contends this evidence is not sufficient to prove the assault as alleged, and that the revolver was not shown to be a deadly weapon. He was possessed of the present means and ability for executing his expressed intention of killing his victim. He actually placed the loaded revolver against her person. Under the evidence, his intention in performing these acts, in making the assault, and in declaring his purpose, was for the consideration and determination of the jury. It is idle to contend that a loaded revolver in the hands of one threatening death to his victim is not a deadly weapon. The jury were justified in finding that it was a deadly weapon. Rem. & Bal. Code, § 2749, under which appellant was tried, provides that an assault with a deadly weapon, with an intent to inflict upon the person of another a bodily injury, where no considerable provocation appears, shall subject the offender to punishment therein prescribed. Rem. & Bal. Code, § 2746, thus defines an assault:

"An assault is an *attempt* in a rude, insolent, and angry manner unlawfully to touch, strike, beat, or wound another person, coupled with a present ability to carry such attempt into execution. . . ."

The evidence in this case shows an assault by appellant, who was armed with a deadly weapon, and is sufficient to sustain the jury in its finding that such assault was made with a deadly weapon, with an intention to inflict bodily injury upon Mrs. Hays, and that no provocation whatever appeared therefor.

Our view of the sufficiency of the evidence disposes of the other assignments of error, which are predicated on exceptions to instructions given, and requested instructions re-

fused. We have carefully examined the instructions and find them free from error.

The appellant has been awarded a fair trial. The judgment is affirmed.

DUNBAR, C. J., MORRIS, and CHADWICK, JJ., concur.

[No. 9042. Department One. March 4, 1911.]

FRANK M. WATSON, *Respondent*, v. EDWARD M. BAYLISS, *Appellant*.[1]

PRINCIPAL AND AGENT—FRAUD—ACCOUNTING BY AGENT. Where an agent defrauds his principal by purchasing property and misrepresenting the price paid, the principal need not rescind the sale, but may recover money paid not used by the agent in the purchase.

SAME. An agent employed to purchase property at the best price obtainable cannot deceive his principal and make a profit thereon by reason of the fact that he held an option on the property at the time of his employment.

Appeal from a judgment of the superior court for King county, Yakey, J., entered May 12, 1910, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action for fraud. Affirmed.

Sanderson Reed and *McClure & McClure*, for appellant.

Holzheimer, Herald & Holzheimer, for respondent.

FULLERTON, J.—The respondent brought this action against the appellant to recover money obtained from him through fraud and deceit. In his complaint the respondent alleged that on or about May 24, 1909, he employed the defendant as his special agent to go from the city of Seattle, in the state of Washington, to the city of Portland, in the state of Oregon, and there negotiate with and purchase from the owner, for the lowest price for which the owner would

[1]Reported in 113 Pac. 770.

sell the same, certain personal property, being the machinery, fittings and furnishings of a certain show or exhibition, known as, "The Land of the Midnight Sun." That in accordance with such agreement, the appellant immediately went from the city of Seattle to the city of Portland, and as such special agent, negotiated with the owner for the purchase of the personal property mentioned, and while there communicated with the respondent and falsely, fraudulently and deceitfully informed him that the lowest price for which the owner would sell and transfer such personal property to the respondent was the sum of $2,750, and that upon the transmission of that sum to the appellant, he would purchase the personal property from the owners and forward it to the respondent. That thereupon he forwarded the sum requested to the appellant, who thereafter purchased the personal property from the owners, and in due course the same was forwarded to the respondent at Seattle. The respondent further alleged that the appellant negotiated with and purchased the property from its owners for the sum of $825, and no more, but wrongfully and fraudulently reported the purchase price to be $2,750 for the purpose of cheating and defrauding the respondent, and thereafter did appropriate to his own use of the moneys forwarded him by the respondent the sum of $1,925, to the respondent's damage in that sum. The answer was in effect a general denial of the allegations of the complaint.

On the trial the respondent's evidence tended to prove the allegations of his complaint. It developed, however, that the appellant, at some time prior to the date he accepted employment from the respondent, had entered into negotiations with the owners of the personal property for the purchase of the same, and had secured an option to purchase it, expiring January 1, 1909, for the sum of $825, payable $600 in cash and the release of a claim which the appellant had against the owners of the property for $225, and that the appellant on reaching Portland and securing the money from the re-

spondent had simply taken up his option by paying to the owners $600 in cash and releasing his claim. There is no direct evidence in the record tending to show the value of the property; that is, none of the witnesses attempted to place a value upon it as it was at the time it was received by the respondent. It was shown, however, that its owners readily sold it for $825, and that it cost the respondent some $1,500 to put in a workable condition.

The principal contention on the part of the appellant is that the respondent has mistaken his remedy. He argues that, conceding there was fraud practiced upon him by the appellant, he had, on its discovery, a choice of three remedies: (1) he could rescind the contract, return the property to the appellant and sue him for the purchase price paid; or (2) he could retain the property and if its value was less than the sum paid for it, recover the difference between its value and the price paid; or (3) he could recover the difference between the price paid the appellant for the property and the price paid by the appellant to the former owners, if the property was purchased by the appellant for himself after he became the respondent's agent for the purpose of purchasing it for the respondent. He argues, further, that the respondent is estopped to recover on the first ground stated, because he did not offer to return the property; that he cannot recover on the second ground because he failed to prove that the value of the property was less than the sum he paid for it; and that he cannot recover on the third ground because it was not shown that the appellant purchased the property after he became the agent of the respondent.

In answer to the objections it is not necessary that we notice the first two remedies suggested, as it is evident that the respondent has based his right of recovery on the last ground suggested. On this ground we think his right of recovery plain. The appellant was not the owner of the property at that time. True, he had an option entitling him to purchase

it, but this did not make him the owner. When, therefore, he undertook to procure it from its true owners for the respondent at the best price obtainable, he was bound to account to the respondent for any money he received from the respondent for the purchase of the property not used in making the purchase, whether he received it in good faith or with an intent to defraud. Nor does the fact that the respondent kept the property alter his right to recover. He may keep the property because it is his, because it was purchased for him and with his money. But the fact that he keeps it does not prevent him from exacting good faith on the part of his agent. *Hindle v. Holcomb*, 34 Wash. 336, 75 Pac. 873; *Jameson v. Kempton*, 52 Wash. 106, 100 Pac. 186.

The appellant cites and relies upon the cases of *Ely v. Hanford*, 65 Ill. 267, and *Kilbourn v. Sunderland*, 130 U. S. 505. The first of these cases, while conceding the right of a principal to recover the difference between the amount paid by his agent for a specific property and a greater sum he had obtained from his principal by falsely pretending that he had paid the greater sum, holds that the rule is different when the agent had contracted for the property in advance of his employment as agent. But it seems to us that this distinction is not sound. The agent should not be allowed to make a profit out of his bargain by deceiving his principal. This is contrary to the fundamental principles of agency, where the utmost good faith is required.

Nor is the remedy by rescission always available. The discovery of the fraud may not take place until after the purchaser has placed permanent and costly improvements on the property, the value of which cannot be accurately estimated, or after he has put it beyond his power to return it. And again, the amount the agent unlawfully exacts, when compared with the whole purchase price, is usually small, and the difficulty experienced in so framing a judgment that the principal may not lose the purchase price paid as well as the property he returns is so difficult as to make the

remedy of but little value. The safe rule is to hold the agent to a strict accountability, and compel him to return any sum he receives from his principal over and above the sum he actually pays for the property. The case from the supreme court of the United States is so different in its facts from the one at bar as to render it inapplicable as an authority. Moreover, we think these cases, if they do maintain the rule contended for by the appellant, are contrary to the rule heretofore announced by this court in the cases before cited. On the principle of *stare decisis*, therefore, we ought not to follow them.

The judgment is affirmed.

MOUNT, PARKER, and GOSE, JJ., concur.

[No. 8910. Department One. March 6, 1911.]

CHARLES E. PACKARD *et al.*, *Appellants*, v. J. M. BOOTH *et al.*, *Respondents*.[1]

SPECIFIC PERFORMANCE—DEFENSES—FAILURE TO PAY PRICE—NOMINAL DAMAGES. Specific performance of an oral contract to convey land, of which the vendees were put in possession without making any payment, will not be decreed where the vendees breached a condition relating to the payment of part of the purchase price, the price to be paid was the full market value, and the vendees had incurred but a nominal expense in building a fence.

Appeal from a judgment of the superior court for King county, Main, J., entered February 5, 1910, in favor of the defendants, after a trial on the merits before the court without a jury, in an action for specific performance. Affirmed.

Arthur C. Dresbach (*F. A. Gilman*, of counsel), for appellants.

Thomas T. Littell, for respondents.

[1]Reported in 113 Pac. 774.

FULLERTON, J.—On March 20, 1909, the respondents Booth and wife, being then the owners of lot 4, in block 6, of Hillman's School House division of Green Lake addition to the city of Seattle, contracted to sell a strip 14 feet wide on the east side thereof to the appellants Packard The contract was oral, and nothing was paid by the purchasers on the purchase price. The parties, however, measured the strip upon the ground and erected a fence which divided the tract from the remaining part of the lot and made it a part of the enclosure belonging to the appellants. The appellants immediately entered upon and took possession of the tract and continued thereon until about June 19, 1909, when the respondents re-entered, removed the fence, and ousted them therefrom. The appellants thereupon brought the present action to enforce a specific performance of the contract. In their complaint, after alleging the facts we have recited, further alleged that they had agreed to pay for the land the sum of $325 on or before December 1, 1909; that they were able and willing at that time to pay the purchase price of the land, and prayed that they be allowed to pay the same into court for the respondents and have a decree of the court enforcing a specific performance of the contract.

The respondents answered, admitting the oral contract to convey, the fact that the land had been marked off and the appellants put into possession thereof, and the subsequent re-entry by the respondents, but denied that the consideration for the transfer was as the appellants had stated it. On the contrary, they alleged that the purchase price of the property was $350, and such proportionate share of the charges for public improvements levied upon lot 4 as the part contracted to be sold bore to the whole lot; further alleging that $50 of the principal sum was to be paid on May 1, 1909, and the balance on December 1, 1909, and that the special assessments were to be paid at the time they became due. They further alleged that, at the time the first payment of $50 became due, they demanded the same of the appellants, who

failed and refused to pay the same or any part thereof; that they thereupon notified the appellants that the agreement to convey would be, and was, terminated; and that they reentered into possession of the tract agreed to be conveyed, after they had demanded payment of the first installment of the purchase price and payment thereof had been refused.

On the trial the appellant Charles E. Packard testified to the contract substantially as it was alleged in his complaint, while the respondents' theory was supported by the testimony of J. M. Booth and Charlotte L. Booth. The court made no findings of fact or conclusions of law, but at the conclusion of the case entered judgment in favor of the respondents, and this appeal was taken therefrom.

On the disputed questions of fact presented by the record we are constrained to adopt that view which supports the judgment of the trial court. It is supported by two witnesses, and a careful examination of the evidence fails to convince us that they were of less probity than was the witness testifying for the appellants. There was then a breach of the contract on the part of the appellants with reference to the payment of the purchase price, and the question for determination is, will the court enforce a specific performance of the contract in spite of this breach. Ordinarily, where a great injury will result to a party to a contract if the other party is allowed to repudiate it, it will be specifically enforced, notwithstanding some breach of its conditions may have been made by the party seeking to have it enforced, and this particularly if the breach is a violation of some condition relating to the payment of the purchase price, the governing principle being to give aid to that party having the greater equities. But here the appellants suffered but nominal damages, if any, by reason of the rescission. The construction of the fence cost but a nominal sum, and the witnesses all testify that the price agreed to be paid for the land was its full market value. There is, therefore, nothing in the case that appeals to a court of equity, and we think the trial court

was right in leaving the appellants to such remedies as the law affords them.

The judgment is affirmed.

GOSE, MOUNT, and PARKER, JJ., concur.

[No. 9230. Department One. March 7, 1911.]

JAMES A. MURRAY, *Appellant*, v. TRUMBULL & TRUMBULL, *Respondents*.[1]

ATTORNEY AND CLIENT—COMPENSATION—AMOUNT—CONTRACT—EVIDENCE—SUFFICIENCY. The evidence supports findings to the effect that attorneys contracted to foreclose a mortgage for $500 only in case no defense was made, where they so testified and it appears that the client represented that no defense would be made and none was contemplated; and a vigorous defense having been made without any agreement covering that contingency, they were entitled to recover a reasonable fee.

Appeal from a judgment of the superior court for King county, Webster, J., entered July 1, 1910, in favor of the defendants, after a trial on the merits before the court without a jury, in an action to compel the delivery of a check held by attorneys. Affirmed.

Hughes, McMicken, Dovell & Ramsey, for appellant.

Trumbull & Trumbull, for respondents.

MOUNT, J.—This proceeding was begun by the appellant, to compel the respondents, Trumbull & Trumbull, to deliver to appellant a check for $70,158.89, being the proceeds of a mortgage foreclosure in the case of *Murray v. O'Brien*, 56 Wash. 361, 105 Pac. 840. A show cause order was issued and served upon respondents, Trumbull & Trumbull, who answered, admitting possession of the check, but alleged that they had been employed as attorneys for appellant in the foreclosure action, and claimed a lien upon the check for a rea-

[1]Reported in 113 Pac. 769.

sonable attorney's fee in the sum of $7,500. The answer also set out a history of the litigation. The appellant, for reply to this answer, admitted the employment of Trumbull & Trumbull as attorneys in the foreclosure action, and alleged that such services were rendered under a contract by which respondents, Trumbull & Trumbull, for an agreed fee of $500, undertook to foreclose the mortgage and to secure the sale of the mortgaged property. The appellant also further alleged that, by reason of the improper conduct of respondents in the foreclosure case, the mortgage of the appellant was placed in jeopardy, and appellant was deprived of interest on the mortgage for approximately one year, and was compelled to pay a large sum of money for additional counsel to finally secure a decree of foreclosure of the mortgage. Upon these issues the case was tried to the court without a jury, and the court concluded that the respondents were entitled to a lien upon the proceeds of the foreclosure sale in the sum of $5,000, which was adjudged a reasonable attorney's fee in the case, and entered a judgment to that effect. This appeal is prosecuted from that judgment.

The appellant argues that there was an agreement fixing the compensation of the respondents at $500, and that there can be no additional recovery. The evidence is conclusive to the effect that there was an oral agreement between appellant and respondents, Trumbull & Trumbull, at the time of the employment, but the terms of that agreement are disputed. The appellant contends that the respondents agreed to foreclose the mortgage for the sum of $500, while the respondents contend that the agreement was that they should make the foreclosure for the sum of $500, provided there was no defense to the action; and in case there was a defense, no fee was agreed upon. The evidence is clear that, at the time the agreement was made, it was stated by the appellant and his agents that no defense would be made to the foreclosure action, and the parties at that time contemplated no defense. The evidence is also clear that vigorous defense and counter actions were

waged from the beginning to the end of the case. There can be no doubt about the rule that, where an attorney agrees to do a certain piece of work for a stated fee, he is bound by that fee, notwithstanding the amount of work may be greater than was anticipated.

"It is well settled that there cannot be an express and an implied contract embracing the same subject-matter at the same time. The former necessarily excludes the latter. It is only where parties do not expressly agree, that the law interposes and raises a promise. The reason of the rule is plain. The parties are bound by their agreement, and therefore there is no ground for implying a promise where there is an express contract." 15 Am. & Eng. Ency. Law (2d ed.), p. 1078.

"An agreement by which an attorney undertakes, for a specific compensation, to conduct the prosecution or defense of a case or other matter intrusted to him, contemplates that the amount fixed is to cover compensation for all services which are ordinarily or necessarily incidental to the proper conduct of such case, and the attorney cannot recover extra compensation for the performance of any such services. Where, however, he renders services clearly not contemplated as probable or necessary at the time of making the agreement, but made necessary by subsequent unexpected and unusual developments in the progress of the case, he is entitled to extra compensation on the ground that the original agreement did not cover the services performed." 3 Am. & Eng. Ency. Law (2d ed.), pp. 442-3.

See, also, *Isham v. Parker*, 3 Wash. 755, 29 Pac. 835.

In this case the trial court, upon hearing the evidence, concluded that the terms of the contract entered into did not contemplate that the fee of $500 agreed upon was an absolute fee for the foreclosure of the mortgage, but was agreed upon only in case there was no defense to the action, and there being a defense, there was no contract as to the amount of the fee in such case. In this we think the court was amply justified, in view of the circumstances surrounding the employment. Since a vigorous defense was made, and since there was no agreement as to the amount of the fee under that contingency,

it follows that the respondents were entitled to a reasonable fee therefor. The amount of the fee allowed by the court is not attacked, except that the appellant contends that the defenses were brought about by the conduct of the respondents themselves, and for that reason no recovery should be allowed. It appears that, after defenses had been interposed, certain tenders were made by parties holding the equity of redemption in the mortgaged property. These tenders were all declined by the respondents. The evidence is in conflict upon this question, the appellant contending that the attorneys were directed to accept an unconditional tender, while the respondents testify that they were directed not to receive such tender. There is sufficient in the case to justify the conclusion that counsel were not at fault, and for that reason we shall not disturb the judgment entered.

The judgment is therefore affirmed.

DUNBAR, C. J., PARKER, and FULLERTON, JJ., concur.

[No. 9235. Department One. March 7, 1911.]

H. C. KRACHT *et al.*, *Appellants*, v. EMPIRE STATE SURETY COMPANY, *Respondent*.[1]

PRINCIPAL AND SURETY—OBLIGATION OF SURETY—CONTRACT. There is no liability on a surety bond guaranteeing the performance of a building contract, where the parties had entered into, and the building was completed under, a new contract materially different calling for larger payments to the contractor during the progress of the work.

Appeal from a judgment of the superior court for King county, Gay, J., entered May 12, 1910, granting a nonsuit in an action upon a surety bond. Affirmed.

John E. Ryan and *E. M. Stanton*, for appellants.

John P. Hartman, for respondent.

[1]Reported in 113 Pac. 773.

MOUNT, J.—This action was brought to recover upon a surety bond, for failure of a contractor to comply with his contract to construct a dwelling house for the plaintiffs. The case was tried to the court without a jury. At the close of the plaintiffs' evidence, the court dismissed the action, and the plaintiffs have appealed.

It appears that, on the 9th day of March, 1909, the plaintiffs entered into a contract with H. C. Burton, by the terms of which contract Mr. Burton agreed to furnish the material and construct a dwelling house for the plaintiffs upon a certain lot in the city of Seattle, for the price of $2,185. The contract provided, among other things, that during the construction of the house, the plaintiffs were to pay to Mr. Burton $500. The house was to be finished and final payment made ninety days after the date of the contract. After the contract had been executed in duplicate by the parties, each one taking a copy, the plaintiffs concluded that they desired a surety bond for the faithful performance of the contract, and notified Mr. Burton to that effect. A week or ten days after the execution of the contract of March 9, the plaintiffs and Mr. Burton entered into a new contract for the construction of the same house covered by the former contract. This latter contract was dated March 10, 1909, and contained the same provisions as the former one, excepting that it required the contractor to furnish a bond in the sum of $500, and provided that the plaintiffs should pay labor bills amounting to $700 during the course of construction, and that final payment should be made within ninety-five days after the contract was completed.

Mr. Burton procured the bond sued upon, which bond referred to and made the contract of March 9 a part of the bond. No mutual mistake in the issuance of the bond was proven. It recites specifically that it was given to secure the contract entered into on March 9, 1909, between the plaintiffs and Mr. Burton. It was the duty of appellants to know that the bond secured the contract under which the house was

built. There is no evidence in the record to show that the surety company intended to secure the contract dated March 10, 1909, which was materially different from the one named in the bond, and there is no evidence to show that the surety company knew anything about the later contract. The building was constructed under the terms of the later contract, and more money was paid to the contractor during the progress of the work than was agreed to be paid under the contract secured by the bond. It is clear, therefore, that there was no liability upon the bond, for "the surety is only bound to the extent and in the manner and under the circumstances he consented to become liable." *Friendly v. National Surety Co.*, 46 Wash. 71, 89 Pac. 177, 10 L. R. A. (N. S.) 1160.

The judgment must therefore be affirmed.

DUNBAR, C. J., PARKER, GOSE, and FULLERTON, JJ., concur.

[No. 9091. Department One. March 8, 1911.]

A. J. FINLAY *et al.*, *Plaintiffs*, v. LOUIS TAGHOLM *et al.*, *Respondents*, W. P. FULLER & COMPANY, *Appellant*.[1]

MECHANICS' LIENS—MATERIALMAN—CONTRACT—EVIDENCE—SUFFICIENCY. A corporation did not furnish material on the credit of the owners of the property, where it appears that it furnished the same under an agreement with contractors, and the alleged substitution of the credit of the owners was by an agent without authority, and at a later time than alleged, it being after part of the materials were furnished.

SAME—NOTICE—DUPLICATE STATEMENTS. Under Rem. & Bal. Code, § 1133, requiring duplicate statements of material furnished to contractors to be given to the owner at the time the materials are delivered, one duplicate statement, given when the last of the materials are furnished, is insufficient.

SAME—DUPLICATE STATEMENT—EXCUSE. The duplicate statements to the owners of materials furnished to contractors, required by Rem. & Bal. Code, § 1133, to be given when the materials are furnished, is not excused by the fact that the owner had notice that

[1]Reported in 113 Pac. 1083.

they were being furnished, said section providing that no materialman's lien shall be filed unless the provisions of the statute are complied with.

Same—Who is Materialman—Subcontractors. A corporation furnishing to contractors the sashes, doors and glass for a building is not a subcontractor or entitled to file a lien as such.

Appeal by cross-complainant from a judgment of the superior court for King county, Gilliam, J., entered April 18, 1910, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action to foreclose a materialman's lien. Affirmed.

Cassius E. Gates and *Farrell, Kane & Stratton*, for appellant.

Peters & Powell, for respondents.

Gose, J.—The appellant, W. P. Fuller & Company, a corporation, by this appeal seeks to have a lien declared against the property of the respondents Tagholm, Jensen, and Nelson, for the sum of $2,184.54, with interest and costs. The trial court decreed it a lien to the extent of $112.40 for extras, but denied the lien for the larger amount. The court found that, on the 21st day of April, 1909, the appellant entered into an agreement with Noyes & Dutton, who had a contract with the respondents for the construction of a building on their property, to furnish certain material to the contractors to be used in the construction of the building, at the agreed price of $2,184.54; that the appellant commenced furnishing material on the 22d day of June, and continued until the 10th day of September, 1909, when the delivery was completed; that the material was used in the construction of the building, and "that at the time such materials were delivered to be used in the construction of said building, W. P. Fuller & Company did not deliver or mail to the owners, or any of them, a duplicate statement of all such materials so delivered." It is conceded that the appellant did not deliver or mail to the respondents a duplicate or any statement of the material de-

livered to the contractors, until the day following the last delivery of the material.

The appellant asserts the right to a lien upon three grounds: (1) That after agreeing with the contractors to furnish the material, one P. Nelson, an agent for the respondents, agreed with the appellant that the credit of the respondents should be substituted for that of the contractors; (2) that the delivery of the duplicate statement after the last delivery of the material, the respondent having actual notice that the appellant was furnishing the material, satisfies the statute, and (3) that the appellant was a subcontractor.

Upon the question of agency, the trial court held that P. Nelson had no authority to bind the respondents for the payment of the material. There is abundant evidence to support this view. Moreover, a reading of the testimony has convinced us that the first conversation he had with the agents of the appellant was after July 24, instead of before June 10, as the appellant insists. We think this is made clear from the fact that, on the former date, a considerable sum of money was paid to Dutton, one of the contractors, who on that day or the day following, abandoned the work and disappeared. Some of the appellant's witnesses testified that, in the first conversation with Nelson, when he agreed that the respondents would pay for the material, he referred to the fact that Dutton had left, and that knowing that fact the appellant would not have delivered the material except upon the credit of the respondents.

Appellant agreed with the contractors to, and did, furnish the sashes, doors, and glass for the building. The delivery began on June 22, and continued as needed until September 10, when the last material was delivered. On September 11, the appellant delivered to the respondents a duplicate statement of the materials furnished. The material was used in the construction of the building, and the evidence justifies the conclusion that the respondents knew who furnished it. Laws 1909, p. 71, § 1 (Rem. & Bal. Code, § 1133), provides

that every person furnishing material to be used in the construction of a building

"Shall, at the time such material or supplies are delivered to any person or contractor, deliver or mail to the owner, or reputed owner, of the property, on, upon or about which said materials or supplies are to be used, a duplicate statement of all such materials or supplies delivered to any contractor or person to whom any such materials or supplies have been sold or delivered, and no materialman's lien shall be filed or enforced unless the provisions of this act have been complied with."

Appellant's second contention cannot be upheld without nullifying the statute. In meeting a similar contention in *Finlay v. Tagholm*, 60 Wash. 539, 111 Pac. 782, we said that the statute needs no construction, and "that its terms are plain and its object evident." There is no primary obligation on the respondents. In order for the appellant to get the benefit of the statute, it must comply with its terms. In arguing for a liberal interpretation, the appellant says that "such a strict construction of the law would defeat the objects for which the law was enacted." The statute, however, upon which the right to claim a lien must depend, says "that no materialman's lien shall be filed or enforced unless the provisions of this act have been complied with." The legislature has made no exception for cases where the owners of the property have knowledge that the material is being furnished. The appellant has cited *Breneman v. Beaumont Lumber Co.*, 12 Tex. Civ. App. 517, 34 S. W. 198, and *Wood v. Amarillo Improvement Co.* (Tex.), 31 S. W. 503. These cases, however, proceed upon the theory that the provisions of a similar statute are unreasonable and in contravention of the provisions of the constitution of the state, which gives a lien and which the court holds is self-executing.

The third point urged, that the appellant is a subcontractor, is without merit. If one who furnishes the sashes, doors, and glass for a building is a subcontractor, every materialman would fall in that class, and such construction would

nullify the plain terms of the statute. The argument that the contract to furnish the material is an entirety, and that it is difficult to comply with the statute, is one that should be addressed to another department of the state government. We are not responsible for the wisdom or the expediency of the law.

We think the learned trial court correctly resolved the questions of both fact and law, and the decree is affirmed.

DUNBAR, C. J., FULLERTON, MOUNT, and PARKER, JJ., concur.

[No. 9139. Department One. March 8, 1911.]

GUSTAVE STELTER *et al.*, *Appellants*, v. B. P. FOWLER *et al.*, *Respondents*.[1]

APPEAL—RECORD—STATEMENT OF FACTS—NOTICE. A statement of facts will not be struck out because the notice of settlement failed to name the "place" of settlement, where amendments were proposed and accepted but for one immaterial change; since it in effect became an agreed statement.

SAME. Where the certificate of a statement of facts shows that it was certified by the judge who tried the case, the notice of settlement will not be held defective for failure to state the fact.

VENDOR AND PURCHASER—RESCISSION BY VENDEE—WAIVER—DEEDS—CANCELLATION—FRAUD—EVIDENCE—SUFFICIENCY. Where vendees could not read or write the English language, and the vendor defrauded them by representing that $3,000 had been paid on the land contract assigned to them and misread the contract, the taking of possession and cutting the crop by the vendees does not waive their right to rescind, where they did not then know of the misrepresentations as to the $3,000 payment, and acted with diligence as soon as they learned thereof, offering to reassign the land contract and leave the land as they found it; even if their conduct amounted to a waiver of some of the misrepresentations.

EXCHANGE OF PROPERTY—RESCISSION—NOTICE—RIGHTS OF PARTIES. An action to cancel a deed is notice of plaintiff's election to rescind, and his right to relief is not affected by his subsequent default and forfeiture of the land contract assigned to him by defendant in consideration and exchange for plaintiff's land.

[1]Reported in 113 Pac. 1096; 114 Pac. 879.

APPEAL—DECISION—REMAND. A remand, with directions to ascertain the damages under the issues presented, requires a retrial conformable to the applicable rules of law.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered April 6, 1910, upon findings in favor of the defendants, dismissing an action to cancel a deed, after a trial on the merits before the court without a jury. Reversed.

Roche & Onstine and *F. W. Girand*, for appellants.

Henley, Zent & Cannon and *Davis & Davis*, for respondents.

GOSE, J.—On August 18, 1909, the plaintiffs commenced this action for the purpose of setting aside a deed which they had theretofore executed to defendants, and for damages. They have appealed from a judgment dismissing the action. In due time the appellants filed and served a proposed statement of facts, and gave notice to the respondents and their counsel, "that on Friday the 26th day of August, 1910, at ten o'clock, a. m., they would make application to the Honorable E. H. Sullivan, one of the judges of the above entitled court, to settle and sign the statement of facts" in the cause. The notice was properly entitled. Within the time fixed by statute, the respondents filed certain proposed amendments, all of which were allowed by the judge, except that he refused to substitute the word "no" for the word "yes," and thereupon he certified the statement of facts. This fact is shown in the judge's certificate and also appears from a comparison of the proposed amendments with the certified statement of facts.

The respondents have moved to strike the statement of facts, on the ground that the "place" of settlement of the statement was not named in the notice as required by Rem. & Bal. Code, § 389. The testimony of the witnesses would not have been changed by the substitution proposed. A reading of the context clearly discloses what the witnesses intended

to say. No one could be misled by the use of either of the words "yes" or "no." In substance and effect, it became an agreed statement, and the judge was warranted in certifying it, under the provisions of the statute above cited. The motion also suggests that the notice fails to state that Judge Sullivan is the judge before whom the cause was tried. This, however, appears in the certificate. The motion is denied.

The complaint, in substance, alleges that the appellants were the owners of one hundred and sixty acres of land in Spokane county, of the value of $12,000, subject to a mortgage of $2,900, on the 11th day of June, 1909; that the respondents had a contract for the purchase of a section of land in Adams county at the agreed price of $12,800; that on the date stated, the appellants conveyed their land to the respondents, in consideration of the assignment of the contract which the latter held on the Adams county land; that the respondents induced the appellants to make the exchange by representing that $3,000 had been paid on the contract; that the land was worth from $35 to $40 per acre; that it was in crop and would produce from twenty to twenty-five bushels per acre; that there had been three or four recent heavy rains upon the land; and that it was free from mustard and thistle. It is also alleged that the appellants cannot read or write the English language; that they relied upon the respondents to correctly read the contract to them; that no payments had been made on the land; that it was not worth to exceed fifteen to twenty dollars per acre; that the crop did not yield more than five bushels per acre; that no rain had fallen; that a short time after the exchange of conveyances, the appellants moved onto the land, and upon discovering that the conditions were not as represented, offered to reassign the contract, and demanded a return of the deed. The prayer is for a rescission and for damages. Issue being joined upon the averment of fraud, the case proceeded to trial.

The court found that the respondents had a contract for the purchase of a section of land in Adams county for the

sum of $12,800, and that there was an equal exchange of conveyances as alleged in the complaint. Findings five and six are as follows:

"That the said defendants represented to plaintiffs that three thousand dollars ($3,000) had been paid by defendants upon said contract price; that said land was of the value of $25 to $30 per acre; that said land was free from mustard and thistle, all of which were false.

"That plaintiffs were unable to read and write English; that said defendants have not paid the sum of three thousand dollars ($3,000) upon said contract, and said land was not worth more than thirteen thousand dollars ($13,000)."

There was a further finding, that the appellant husband went to Adams county in the month of May, 1909, in search of land; that he sought the respondents and proposed a trade; that in company with a resident of that part of the county, he drove by the land in question and had an opportunity to inspect it; that thereafter the respondent went to Spokane county at the request of the appellants, inspected their land, and consummated the trade about June 9, 1909; that the next week the appellants moved to Adams county, and after seeing the land and observing the conditions, purchased a house and barn and moved them upon the land; that they occupied the buildings and exercised dominion over the land continuously until after the harvest of 1909; that they cut and stacked the crop grown thereon; that on July 28 the appellants listed the land for sale with certain real estate agents for a period of six months, at the price of $35 per acre, and that they made no effort to rescind the contract of sale and exchange until the commencement of the action. The court deduced the legal conclusion that the appellants "elected to and did affirm the contract," and that they cannot now rescind. At the trial the appellants tendered a reassignment of the contract for the Adams county land.

There is abundant evidence of the most convincing nature to support all the findings of fact made by the court, except

that the date of the listing of the Adams county land for sale with the real estate agents was upon June 28 instead of July 28, and the listing price was thirty instead of thirty-five dollars per acre. The evidence discloses a further significant fact not found by the court, viz., that the appellants shipped their goods, including the contract, from Spokane to Adams county, and that the goods did not arrive until some three or four weeks after the appellants moved onto the land. It was not until after the middle of July that the appellants received their goods and with them the contract. They then had the contract reread to them, and first learned that there had been no payment on the land and that the representation that $3,000 had been paid was false. While the evidence is not clear upon the point, we think it may reasonably be inferred that the crop had then been cut and stacked. Upon discovering that no payment had been made on the land, the appellants proceeded with reasonable promptitude to give notice of rescission. They took nothing from the land, and left the house and barn upon it and cut and stacked the crop. The respondents were in no way injured or misled.

The taking of possession and the cutting of the crop may properly be held to constitute a waiver as to all misrepresentations then known, but they do not preclude a rescission for fraud which was discovered later. Nor can it be said that the appellants were wanting in diligence in having the contract reread to them. They had relied upon the respondent husband and one Schutz, a real estate agent, to correctly read the contract, and it does not lie with respondents to urge that the appellants should bear the burden of their own credulity. No man should be permitted to sell or exchange a lie for more than its intrinsic value. It has from the beginning been one of the boasted tenets of equity that it would protect the weak, ignorant, and credulous against the machinations of the strong and the designing. The question of the value of the land and the amount of the yield may be treated as expressions of opinion, but all other matters, such as recent

rains, and that the land was free from mustard and thistle, were statements of material facts. It is not important to determine whether Schutz, the real estate agent, was the agent of appellants or of respondents. In either event the evidence is convincing that there was a collusion between him and the respondent husband, and that he, with the knowledge of the latter, misread the contract to the effect that $3,000 had been paid. It is also worthy of notice that the Adams county land was listed for sale with Schutz upon his representations to the appellants that he could promptly sell it at a price that would compensate them for their land. We have no doubt that this was but another step in the furtherance of the fraud. Upon the facts stated, the election to rescind was timely, and the respondents were in no wise prejudiced or misled. This view is supported by the following cases: *Best v. Offield*, 59 Wash. 466, 110 Pac. 17; *Grewing v. Minneapolis Threshing-Machine Co.*, 12 S. D. 127, 80 N. W. 176. The prudent protection of perishable property in itself creates but a slight presumption of ratification, and when other fraudulent representations forming a material part of the contract are thereafter discovered, such act will not defeat the right of rescission. The condonation of a part of the fraud does not forbid a rescission for fraud discovered later and not condoned. *Tarkington v. Purvis*, 128 Ind. 182, 25 N. E. 879, 9 L. R. A. 607.

In harmony with the evidence, the court found that the appellants cannot read or write the English language, and that they, relying upon the respondent husband and Schutz, who under the evidence was in collusion with him, to correctly read the contract, conveyed property of the value of $12,000 or more, exclusive of the mortgage, and received in return a contract upon which nothing had been paid and which had no value in excess of the amount due upon it. They waived a part of the misrepresentations, but did not waive the one as to the $3,000 payment upon the contract.

The decree will be reversed, with directions to cancel the

deed from the appellants to the respondents, and to proceed with the trial of the case in the ascertainment of the appellants' damages under the issue presented by the pleadings.

DUNBAR, C. J., FULLERTON, MOUNT, and PARKER, JJ., concur.

ON REHEARING.

[Decided April 5, 1911.]

PER CURIAM.—The respondents have filed a motion asking for a modification of our former opinion. The grounds relied upon are thus stated in the motion:

"(1) That after the decision of the lower court and pending the appeal, appellants by their own negligence and indifference permitted the contract to which they held an assignment from respondents for the section of land to be forfeited by reason of appellants' failure to carry out and comply with its terms and conditions."

At the trial the appellants tendered a reassignment of the contract. The commencement of the action gave notice of their election to rescind. Their failure or refusal thereafter to keep the contract for the Adams county land in force does not affect their right to the relief sought. After the commencement of the action, the parties were required to stand upon their rights as they then existed.

(2) In our former opinion we said:

"The decree will be reversed, with directions to cancel the deed from the appellants to the respondents, and to proceed with the trial of the case in the ascertainment of the appellants' damages under the issue presented by the pleadings."

It is said in the motion that the "respondents should not be shut out by a summary order from contesting the various, or at least some of the elements of damages claimed by the appellants," and that the opinion may mislead the court with respect to the recoverable damages. It is sufficient to say that the trial court will, of course, try the question of damages conformably to the applicable rules of law.

[No. 9256. Department Two. March 8, 1911.]

In the Matter of the Estate of GEORGE HENRY LOTZGESELL, *Deceased.*

GEORGE LOTZGESELL *et al., as Executors etc., Appellants,* v. HENRIETTA CYDELL, *as Executrix, etc., Respondent.*[1]

EXECUTORS AND ADMINISTRATORS — ACCOUNTING — CHARGES — DEFENDING SUITS. Expenses incurred by the executors of a nonintervention will, who were the chief beneficiaries thereof, in defending a suit for an accounting and partition brought by parties claiming part of the estate, are not properly chargeable against the estate, as they were incurred in their own interests and not as executors.

TAXATION — INHERITANCE TAX — EXECUTORS — ACCOUNTING. An inheritance tax is properly charged to the beneficiaries.

WILLS — CONSTRUCTION — RULES — INTENT — AVOIDING INTESTACY. The rule of *ejusdem generis*, as applied to wills, yields to the rule that a will is to be construed to give effect to the intent of the testator, and to avoid intestacy, and when the circumstances show that it would defeat the intention; so that a clause in a will "and in fact all personal property," following a bequest of live stock, farm implements, household furniture and effects, bequeathed to one of the testator's daughters, is not to be restricted by the rule of *ejusdem generis*, but covers $6,245.30 cash handed to the daughter the day before his death, and not otherwise disposed of in the will, where the intent to will all of his property appears by bequests of $50 to each of certain other children, followed by a clause that in times past he had given them their portion of their inheritance, and the balance of the will showed careful attention to every detail of his parental duties and an intent not to die intestate.

WILLS — CONSTRUCTION — LEGACIES — DEBTS. Specific bequests of money are not to be included among "all other just debts" directed to be paid in a certain way, but are to be paid from cash on hand at the time of the testator's death, bequeathed under a residuary clause.

Appeal from a judgment of the superior court for Clallam county, Still, J., entered October 5, 1910, upon findings in favor of the defendant, decreeing the final settlement and dis-

[1]Reported in 113 Pac. 1105.

tribution of an estate, after a hearing on the merits before the court. Modified.

A. W. Buddress, for appellants.

Morris, Southard & Shipley and *James Stewart*, for respondent.

MORRIS, J.—The questions of law involved in this appeal arise from the construction of the last will and testament of the deceased, and the decree of final settlement and distribution as made by the court below. George Henry Lotzgesell died February 16, 1907, leaving a last will and testament, duly attested by subscribing witnesses, as follows:

"I, George Henry Lotzgesell, of Dungeness, county of Clallam, state of Washington, of the age of 78 years, and being of sound and disposing mind and not under the restraint or the influence of any one whatever, do make, publish and declare this my last will and testament in the manner following: That is to say:

"First, I direct that my body be buried with proper regard to my station in life.

"Second. I direct that my funeral expenses and all other just debts shall be paid by my sons George Lotzgesell and Frank Lotzgesell and my daughter Henrietta Cydell.

"Third. I give and bequeath to my daughter Catherine Roberts, of Port Angeles, Wash., the sum of fifty ($50) dollars.

"Fourth. I give and bequeath to my daughter Anna Pilcher, of Seattle, Wash., the sum of fifty ($50) dollars.

"Fifth. I give and bequeath to my daughter Emma Hansen, of Dungeness, Wash., the sum of fifty ($50) dollars.

"Sixth. I give and bequeath to my daughter Lillie Alexander, of Matsqui, British Columbia, the sum of fifty ($50) dollars.

"Seventh. I give and bequeath to my daughter Henrietta Cydell, of Dungeness, Wash., the sum of fifty ($50) dollars.

"Eighth. I hereby appoint my beloved sons George Lotzgesell and Frank Lotzgesell and my beloved daughter Henrietta Cydell executors of my estate without bonds, and they

are hereby empowered to carry out all the provisions of this my last will and testament.

"Ninth. After and immediately following my death, my homestead farm, consisting of one hundred and thirty-nine acres, being in the northwest quarter of section two, township thirty, range four west, together with the east half of the northeast quarter of section three, township thirty, range four west, consisting of eighty acres; also about seventy acres, more or less, in the southwest quarter of section thirty-five, township thirty-one, range four west, shall be occupied, conducted and farmed by my beloved daughter Henrietta Cydell and my son-in-law Frederick G. Cydell upon the following conditions:

"They shall provide a good and comfortable home for my son John Lotzgesell so long as he shall live and shall pay each year to my son John Lotzgesell the sum of two hundred dollars; they shall purchase for him what clothes he requires and give him, in addition, his board in a good and substantial manner.

"They shall also pay all taxes year by year on the said property and all other expenses towards its maintenance, and they shall maintain the said property and improvements in a good and substantial manner, so that its value shall not deteriorate.

"Tenth. After the death of my son John Lotzgesell the said homestead farm and the two pieces of land adjoining, as described and specified above, shall become the sole and undisputed property of my beloved sons George Lotzgesell and Frank Lotzgesell or their heirs, to be divided into two equal pieces.

"Eleventh. All the live stock, consisting of horses, cattle and hogs, together with all agricultural and dairy implements, household furniture and effects, and in fact all personal property, shall become the individual property of my beloved daughter Henrietta Cydell and my son-in-law Frederick G. Cydell.

"Twelfth. I furthermore desire to state in this will that in years and times past I have at various times given to my daughters, Catherine Roberts, Anna Pilcher, Emma Hansen, and Lillie Alexander, moneys and real estate as parts and portion of their inheritance, and I now command that they shall not complain.

"Thirteenth. It is furthermore my will and request that my sons George and Frank Lotzgesell and my daughter Henrietta Cydell shall be the guardians without bonds of my son John Lotzgesell, and as such shall, during his life, look after his every comfort and happiness.

"Lastly. I further direct that the aforesaid named executors shall deliver deeds and bills of sale without an order of the court for that purpose, but shall proceed summarily to administer upon and settle said estate as herein provided, and all without the intervention, supervision, order or decree of any court or judge, except in so far as shall be imperatively required by the laws of the state.

"In witness whereof I have hereunto set my hand and seal this fifteenth day of February, 1907.

"George Henry Lotzgesell."

The executors and executrix therein named entered upon the discharge of their duties, when differences arose as to the proper construction of the will and the allowance of claims. These differences were submitted to the court, resulting in the decree appealed from. It will only be necessary to refer to the decree in so far as its provisions are affected by the appeal.

Certain allowances were made by the court, aggregating $1,610.60, which is charged against the executors and executrix individually and in equal proportion, after giving credit in the amounts paid by each. The court rejected a claim for the allowance of $1,079.50, claimed to have been paid by the executors in defending an action brought by Anna Pilcher and Lillie Alexander, daughters of the deceased, against the other heirs, and including the parties herein, in which the plaintiffs, claiming as heirs of their mother, sought an accounting and partition as against the defendants. This action was decided adversely to the plaintiffs, the opinion and judgment of this court being found in *Pilcher v. Lotzgesell*, 57 Wash. 471, 107 Pac. 340. This order of disallowance is one of the errors suggested by the appeal, and will be hereafter referred to.

In making the allowance of the $1,610.60 item, which includes $250 bequeathed to the five daughters in the sums of $50 each, under the third, fourth, fifth, sixth, and seventh

clauses of the will, and $102.90, state inheritance tax, the court held, as before referred to, that these charges should be borne by George Lotzgesell, Frank Lotzgesell and Henrietta Cydell individually, under the second clause of the will, wherein he directed that his just debts should be paid by those three persons as the chief beneficiaries under the will; which order is also included in the errors assigned. On the day previous to his death and the same day the will was executed, the testator handed to Henrietta Cydell the sum of $6,245.30, no specific mention of which is made in the will, and appellants contend that as to this money testator died intestate; while the court found that it passed to Frederick G. Cydell and Henrietta Cydell under the eleventh clause of the will, being included in the words "and in fact all personal property," which ruling is the third and last error assigned.

Referring now to the first assignment of error in the disallowance of the expenses incurred in the *Pilcher* suit, we sustain the ruling below. The questions involved in that action were purely ones of heirship, the defendants being called upon to account and to partition to and with the plaintiffs their distributive share of the property, real and personal, alleged to have been owned by the mother. Any expense incurred by appellants in that action was in their own interest as heirs, and not as executors of the father's estate. Such expenses were not properly chargeable against the estate, and were properly disallowed. *Wilbur v. Wilbur*, 17 Wash. 683, 50 Pac. 589; *Koppenhaffer v. Isaacs*, 7 Watts 170; *Mumper's Appeal*, 3 Watts & Serg. 441; *Scott's Estate*, 9 Watts & Serg. 98; *Yerkes' Appeal*, 99 Pa. St. 401; *In re Titlow's Estate*, 163 Pa. St. 35, 29 Atl. 758. The inheritance tax, while not a debt of the testator, was properly chargeable to the beneficiaries.

The second and third assignments will be treated together, as they call for a construction of the will, the main question in this connection being whether the testator died intestate as to the $6,245.30 cash, or did it pass to the Cydells under the

eleventh clause. A will should be construed so as to give effect to the desire and intention of the testator, in so far as it is possible to do so from the language used; and in placing a construction upon the will, the courts will avoid and prevent intestacy, if reasonably possible without doing violence to the evident intent of the instrument. In looking for this intent, not only the language used, but the entire purpose and scheme of the instrument must be given effect, and we must look, not only to the property disposed of, but to the surroundings, the persons named as devisees or legatees, their relation to the testator, and what the testator evidently had in mind in employing the language used. *In re Koch's Estate*, 8 Cal. App. 90, 96 Pac. 100.

"Again, it is well settled that, in the construction of last wills and testaments, the scope and import of the entire instrument are to be considered, for the purpose of discovering the intention of the testator, and that such intention, when discovered, is of paramount and controlling influence." *Williams v. Williams*, 18 Tenn. 20.

In looking for this intention, one of the strongest rules employed is that the testator is not to be presumed to intend to die intestate as to any part of his property, if the words of the will can be so construed as to carry the whole estate, unless the contrary intention is so plain as to force a different conclusion. *In re Reimer's Estate*, 159 Pa. St. 212, 28 Atl. 186; *Given v. Hilton*, 95 U. S. 591; *Fry v. Shipley*, 94 Tenn. 252, 29 S. W. 6.

Having in mind these general rules of construction, we come now to appellants' contention that the rule of *ejusdem generis* should be applied to the words "and in fact all personal property," as found in the eleventh clause of the will, and that as so applied, such expression covers property of the nature of the antecedent words in the same clause, and does not include money. The rule of *ejusdem generis* is primarily a rule of statutory construction, to the effect that general and unlimited terms are restrained and controlled by particu-

lar terms when used in the same connection, and as such has often been employed in the construction of wills. But even in its primary use as a rule of statutory construction, it is to be used in connection with other rules, not less important, such as the determination of the evident intent of the law-making body, and does not warrant the courts in confining the operation of a statute within narrower limits than was intended by the law makers. Black on Interpretation of Laws, 143. As applied to wills, such a rule can have no greater nor broader significance than as applied to statutes, and is to be made use of as an aid in ascertaining the meaning of the testator, and should not be employed by the courts, in limiting the meaning of language in a will within narrower limits than was the evident intention of the testator; and being a rule of intention, it must readily yield where the circumstances show that a reliance upon it would defeat, rather than effectuate, the intention of the testator. *Edmonson v. Edmonson*, 1 Tenn. Ch. 563. In speaking of the rule as applied to wills, it is said in *Williams v. Williams*, *supra*:

"But it has been strenuously and elaborately argued that a rule for the exposition of wills, applicable to this item, has been adopted and enforced by courts of chancery, called somewhat quaintly the rule of *ejusdem generis*, and that that rule will have the effect to limit and restrict the general words, 'everything else not otherwise disposed of' (this clause being held to be a general residuary clause) to things of the like nature and description with the antecedent particulars, whiskey, stills, accounts, notes, furniture, stock, etc. If it be intended to assert that courts of chancery have adopted and enforced a rule of artificial and arbitrary construction, or a rule of legal intention, controlling and countervailing, when necessary, the actual intention of the testator, to be gathered from the context and scope and frame of the will, then we have no hesitation in asserting that a careful examination of all the cases relied on for its establishment will demonstrate that no such rule in fact exists. The great rule in the construction of wills, to which the one of *ejusdem generis* and all others, except those founded upon public policy, are not only subordinate but ancillary, is that the intention of the testator, to be

ascertained from the particular words used, from the context, and from the general scope and purpose of the instrument, is to prevail and have effect."

The court adds later on in the opinion:

"But it were needless to cite all the cases referred to in argument; they will all be found to have turned very much upon their own particular circumstances, and they will all manifest the solicitude of the courts to attain, by the adoption or rejection of the supposed rule in question, or other rules, as circumstances might require, the purpose and intention of the testator."

The Pennsylvania court in *Reimer's Estate, supra*, adopts a similar view in saying:

"But it is useless to go over the many cases cited on each side here, for as is said in *Steele v. Thompson*, 14 S. & R. 84: 'Every case of this cast is individual; there can be no adherence to precedents, for no two wills can be exactly alike.' And as is said in *Hoge v. Hoge*, 1 S. & R. 156: 'Cases on wills have no great weight unless exactly similar in every respect. To render them authoritative, they should be *in verbis ipsissimis* and made by the testator in the same situation and circumstances.' The question is, not what might pass by the words 'personal effects,' but what did this testator intend here should pass."

Similar expressions of the courts will be found in: *Le Breton v. Cook*, 107 Cal. 410, 40 Pac. 552; *Rosenberg v. Frank*, 58 Cal. 387; *Lambert's Lessee v. Paine*, 7 U. S. 95, 130.

Following out this rule, we think from an examination of the adjudicated cases in which the application of the rule of *ejusdem generis* has been contended for in the construction of wills, it will be found that such rule has been applied or rejected as the courts have interpreted the intent of the testator from the whole instrument. What, then, was the meaning of the testator in the use of the words "and in fact all personal property," and what did he intend should pass thereunder? If we apply the rule of *ejusdem generis*, these words would not include the $6,245.30 cash, because money is not of the nature of live stock, agricultural or dairy implements,

household furniture and effects, which are the antecedent words in the same clause, and the testator would have died intestate as to this amount and the same would be for general distribution to his heirs.

We were informed on the argument of the case that the will was not drawn by a lawyer, but by a neighbor. This appeals to us as an additional reason why the words in question should be given the meaning of the ordinary layman, rather than any precise, technical, legal meaning. We assume that, since the testator made a will, he knew that if he did not do so, and if in doing so he did not devise or bequeath all his property, the same would pass to his heirs under a general distribution. It is plain, from the twelfth clause of the will, that such was not his intention, in commanding, as he does in this clause, that his four daughters therein named should not complain because they received no more than $50, for the reason that they had been the recipients of his previous bounty to the extent of their share in his property. This entire clause would be meaningless and of no effect if appellants' contention is to prevail and these heirs, after having received their share of their father's property, are now to come in and share alike as to the cash on hand with those who have not been so favored in the past but look to the will for their just share of their father's estate.

It is too plain for argument that it was the intent of the testator that these four daughters should receive no more than $50 from his estate. In order to read such intent, it is equally clear that he did not mean to die intestate as to this money. He knew of its existence. The same day the will was drawn he placed it in the possession of Mrs. Cydell. What for? As a gift *causa mortis*, or because of his understanding that she was the rightful custodian of it, since it, or the great bulk of it, was to pass to her and her husband under the terms of the will; and in wording the eleventh clause of the will, it was the expression of his intention that the Cydells were to take all his personal property of what-

ever name or nature, except the specific legacies theretofore provided for, as it was his purpose under the tenth clause to devise all his real property to his two sons. These three children had not, like the others, received their share of his property. He deemed it just to give all the real estate to the two sons and all the personal property to the daughter and her husband, burdened with the support and maintenance of the incompetent son John during his life, and the payment of taxes; and to the end that the son John should have a safe, sure and certain source for his future support, the Cydells are to farm the homestead and other lands described in the ninth clause, during the natural life of John, upon the express condition of providing him with proper and suitable maintenance. To this end, in the thirteenth clause, he selects the Cydells as the guardians of the incompetent, with directions to "look after his every comfort and happiness."

This father was not unmindful of his parental duty, and every disposition of property in his will is made with due care, mindful of his obligation as a parent and the rights of his children. With such a careful and conscientious attention to every detail, we cannot believe that he had forgotten the existence of this large sum of money, and did not intend it should play its part in the fulfillment of the scheme he intended to initiate. We therefore believe that he had no intention to die intestate as to any of his property, whether real or personal; that he intended to dispose of his entire estate, all the real estate to the sons subject to the life estate created for John's benefit, and all the personal property, subject to the previous specific legacies, to the Cydells to aid them in properly supporting and maintaining John; and in further recognition of the daughter's right, as the only daughter not previously provided for, and in an abundance of caution, desiring nothing to be left undisposed of, he used the words "and in fact all personal property," as a residuary clause; and that thereunder the Cydells became the residuary legatees, and the $6,245.30 passed to them charged only

with the payment of the $50 bequests to the several daughters.

Counsel for appellants urge that, because in the seventh clause of the will he had given Mrs. Cydell the sum of $50, it was an expression of his intention that she was to have no more in money than that sum; and that in this respect the same reasoning that supports the argument that the four daughters named in the twelfth clause were to receive no more than $50 establishes his contention that Mrs. Cydell was to receive only $50. In so contending, appellants overlook the evident intention of the testator to put his five daughters on an equal footing. Four had already received their share of his property. He gives them in addition $50. The fifth daughter had not received her share, but is to receive it by the terms of the will, and, like her sisters, she is to receive $50 in addition to her share; and thus each of the five daughters receive an equal distribution of the estate according to the father's idea of the values of their respective gifts, it being noted in this connection that the limitation in the twelfth clause is to the four daughters therein named, and does not include Mrs. Cydell. Again, these $50 legacies are to each of the five daughters; while the provisions of the ninth and eleventh clauses of the will are not for the sole benefit of the fifth daughter, but for the use and benefit of the fifth daughter, her husband, and the incompetent son John.

One other feature requires attention. The court below included the sum of $250, the aggregate of the $50 legacies to each of the five daughters, in the $1,610.60, which he charged equally to the appellants and respondent under the second clause of the will. This, we think, was erroneous. These legacies cannot be included in the term "all other just debts," as used in the second clause. They are not a debt of the testator, but a specific bequest of money to be paid out of his personal estate; and as the testator knew he had this sum of $6,245.30 in cash at the time of his death, we

think it was his intention that these legacies to the five daughters should be paid out of such sum.

The decree is therefore modified so as to relieve appellants from any contribution to the payment of these cash legacies, and instead to charge them against the $6,245.30. In all other respects, the decree is affirmed. The cause is remanded with instructions to modify the decree as herein set forth. Respondent will recover costs.

DUNBAR, C. J., CROW, and CHADWICK, JJ., concur.

[No. 9090. Department Two. March 8, 1911.]

W. S. CARY, *as Guardian etc., Respondent*, v. SPARKMAN & McLEAN COMPANY, *Appellant*.[1]

NEGLIGENCE—DANGEROUS PREMISES—LIABILITY OF OWNER—MASTER AND SERVANT—INDEPENDENT CONTRACTOR. A building contractor, who undertakes the entire construction of a building, having full charge of the work, the furnishing of labor and material, and exclusive possession, is an independent contractor, and the owner is not liable for his negligence in leaving an opening near the sidewalk during the work of construction, whereby a pedestrian fell into the basement and was injured, where the opening was not a nuisance in the street itself, within Rem. & Bal. Code, § 8309, and was not called for in the contract, and the injury was not the result of any requirement in the contract.

SAME—NEGLIGENCE OF INDEPENDENT CONTRACTOR—PROXIMATE CAUSE OF ACCIDENT. Where a pedestrian stepping off the sidewalk fell into an opening next to the lot line, carelessly left unguarded by the contractor, the proximate cause of the accident is the failure to guard the opening, and not the provisions of the contract calling for a basement window at that place.

CHADWICK, J., dissents.

Appeal from a judgment of the superior court for King county, Albertson, J., entered April 30, 1910, upon the verdict of a jury rendered in favor of the plaintiff, in an action

[1]Reported in 113 Pac. 1093.

for personal injuries sustained by a pedestrian by falling into the basement of a building through an unguarded opening. Reversed.

William W. Wilshire, for appellant.

Brady & Rummens and *Leroy V. Newcomb*, for respondent.

Morris, J.—Appeal from a judgment awarding damages for personal injuries. Appellant is the owner of property in Seattle, situate on the west side of Fifth avenue between Union and Pike streets, and in August, 1908, let a contract to defendant Cannon, for the erection of a six-story building upon the lot, which building is now known as the Hotel Metropole. Cannon immediately entered into possession of the property, and commenced the construction of the building under his contract, whereby he obligated himself to provide all the materials, furnish all the labor, construct the building according to certain plans and specifications, and to deliver the building when fully constructed and completed to appellant. Under the contract appellant reserved no power of control over the contractor in the construction of the building, other than the right of such general supervision as might be necessary in seeing that the building was constructed in accordance with the plans and specifications.

On the evening of January 16, 1909, while the building was in process of construction, the minor respondent was walking up Union street when, discovering that her skirt was unfastened, she turned north on Fifth avenue, seeking a convenient place where she might arrange her clothing free from observation. The darkest part of the street would be at a point midway between Union and Pike streets and in front of this uncompleted structure. Reaching such point, she stepped back for the purpose of getting more completely in the shadow of the building, and fell into the basement through an unguarded opening that had been left for the purpose of putting in a window to admit light and air into the basement, and received the injuries complained of. The

building was built flush up to the property line, and the opening through which respondent fell was on a level with, and extended up to, the inner line of the sidewalk. The contractor, although made a party defendant, was not served; so that the case proceeded against appellant alone upon a general charge of negligence in permitting the opening along the inner edge of the sidwalk to remain unguarded.

The defense was that the negligence complained of was that of the contractor alone, appellant setting forth in detail the general facts heretofore referred to in regard to its ownership of the lot, the making of the contract, the exclusive possession of the property by Cannon under the contract, his construction of the building according to plans and specifications, and his full charge of the construction, except in so far as appellant reserved the right to insist upon a full compliance with the contract. In other words, it sought to escape liability upon the ground that Cannon was an independent contractor. Appellant sought to have the trial court so rule upon motion for judgment, request for instructions, and in moving for a new trial, and the only error that need be discussed by us is the refusal of the court below to so hold, since our holding upon such question will dispose of the whole case. We must, therefore, first determine if Cannon was an independent contractor.

This relation is defined in *Engler v. Seattle*, 40 Wash. 72, 82 Pac. 136, quoting from 16 Am. & Eng. Ency. Law (2d ed.), 187, and cases cited, as:

"Generally speaking, an independent contractor is one who, in rendering services, exercises an independent employment or occupation, and represents his employer only as to the results of his work, and not as to the means whereby it is to be accomplished. The word 'results,' however, is used in this connection in the sense of a production or product of some sort, and not of service. . . . A reservation by the employer of the right by himself or his agent to supervise the work for the purpose merely of determining whether it is be-

ing done in conformity to the contract does not affect the independence of the relation."

The case further cites *Casement v. Brown*, 148 U. S. 615, to the effect that the relation of independent contractor is established when, under prepared plans and specifications, the contractor agrees to build, furnishing his own employees and material, and to produce a completed structure by means of his own labor and material. To the same effect is *Larson v. American Bridge Co.*, 40 Wash. 224, 82 Pac. 294, 111 Am. St. 904. In *Burns v. McDonald*, 57 Mo. App. 599, we find this definition, taken from 2 Thompson on Negligence, 899:

"The general rule is, that one who has contracted with a competent and fit person, exercising an independent employment, to do a piece of work, not in itself unlawful or attended with danger to others, according to the contractor's own methods, and without his being subject to control, except as to the results of his work, will not be answerable for the wrongs of such contractor, his subcontractors, or his servants, committed in the prosecution of such work. An independent contractor, within the meaning of this rule, is one who renders service in the course of an occupation, representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished. The contractor must answer for his own wrongs and the wrongs committed in the course of his work by his servants."

The same rule is announced generally in *Boardman v. Creighton*, 95 Me. 154, 49 Atl. 663. Upon the general rule, that those who undertake, as in this instance, the construction of an entire building, having full charge of the work, the furnishing of labor, the supply of material, coupled with exclusive possession, save the right of the owner to come upon the premises for the purpose of ascertaining and insisting upon a full compliance with the contract, are independent contractors, as that term is here used and defined, see: *Schwartz v. Gilmore*, 45 Ill. 455, 92 Am. Dec. 227; *Pfau v. Williamson*, 63 Ill. 16; *Kepperly v. Ramsden*, 83 Ill. 354;

Richmond v. Sitterding, 101 Va. 354, 43 S. E. 562, 99 Am. St. 879, 65 L. R. A. 445; and cases cited in note 6, at page 461.

Upon the first question reserved, we are of the opinion that Cannon was an independent contractor, and that no liability would attach to the owner of the premises upon which the building was erected for the negligence of the contractor, unless the case before us falls within some recognized exception to this general rule, and these exceptions are as definite of statement and as clear in their application as the rule itself.

"Generally speaking, where the act which causes the injury is one which the contractor is employed to perform, and the injury results from the act of performance and not from the manner of performance, or where the contractor is employed to do an act unlawful in itself, or where the injury is due to defective plans or methods pursuant to which the work is done, or where the work is inherently or intrinsically dangerous in itself and will necessarily or probably result in injury to third persons, unless measures are adopted by which such consequences may be prevented, and in other like cases, a party will not be permitted to evade responsibility by placing an independent contractor in charge of the work." *Kendall v. Johnson*, 51 Wash. 477, 99 Pac. 310.

See, also, *Seattle Lighting Co. v. Hawley*, 54 Wash. 137, 103 Pac. 6; *Engel v. Eureka Club*, 137 N. Y. 100, 32 N. E. 1052, 33 Am. St. 692; *Boomer v. Wilbur*, 176 Mass. 482, 57 N. E. 1004, 53 L. R. A. 172. So, where the ordinary method of doing the work creates a nuisance, the exception prevails. *City of Moline v. McKinnie*, 30 Ill. App. 419; *Cuff v. Newark & N. Y. R. Co.*, 35 N. J. L. 17, 10 Am. Rep. 205; *Ryan v. Curran*, 64 Ind. 345, 31 Am. Rep. 123.

It is upon this last phase of the exception that counsel for respondent urge the right of recovery, contending that appellant knew that the building could not be constructed without openings; that the plans called for this basement window, and that it could not be constructed without an opening flush

with the sidewalks through which there was a probability of pedestrians falling, and that for this reason the work was inherently and intrinsically dangerous and constituted a nuisance, especially in the light of Rem. & Bal. Code, § 8309, defining a nuisance as the unlawful doing of an act or omitting to perform a duty which injures or endangers the safety of others, or renders dangerous for passage any street or highway, or in any way renders other persons insecure in life. And in support of this contention, strong reliance is had upon *Robbins v. Chicago*, 71 U. S. 657, where the contract called for an excavation of the sidewalk adjoining the building being erected, so as to admit light and air into the basement. A passer-by fell into this excavation in the sidewalk, which was left unguarded, and recovery was sustained upon the theory that a hole in the sidewalk of a large city, left unguarded at night and without lights, was a nuisance, rendering the owner of the lot and building liable. Many other like cases are cited and urged as authoritative here, but the vice of this contention lies in the fact that the opening in controversy was not in the sidewalk, nor was it such an opening as pedestrians, passing along and upon the sidewalk, would ordinarily fall into unless protected by guards or danger signals. To leave such an opening in the street without guards or danger signals falls within every known exception to the independent contractor rule. The owner of a building, whose basement extends under the sidewalk and whose plans call for an excavation of the sidewalk, knows, or must know in law, that his basement cannot be built according to the plans without an opening in the sidewalk into which there is not only a likelihood, but a great probability, that persons walking upon the sidewalk at night will fall, if left without proper and sufficient guards. The work itself calls for a dangerous situation, and the duty of protection cannot be shifted.

But we have no such facts in the present case. The ap-

pellant did not contemplate nor call for this opening in his contract. The contract, it is true, called for a basement window, but this did not necessarily mean nor contemplate that the contractor should create an opening of the size and character of this opening. The manner of providing for this basement window was a matter of detail, wholly within the duty of the contractor. He could put it in in as many different ways as might be possible. His contract called for a window and not an opening, and the time, the manner, and under what circumstances it should be done, were matters over which the owner had neither control, supervision, nor right of suggestion. *Frassi v. McDonald*, 122 Cal. 400, 55 Pac. 139. The owner could demand and insist upon a window at that place in the building, but he could not demand nor insist upon an opening as a necessary part of that window or of its construction. The injury to respondent, then, was not because of any requirement of the contract, but rather was it the result, and the result alone, of the careless and negligent act of the contractor in leaving an unnecessary opening unguarded, for which he alone must answer.

Another way of arriving at a solution of the question is to ascertain what was the proximate cause of this injury, and it can hardly be said it was the provision of the contract calling for a basement window, rather than the careless act of the contractor in unnecessarily leaving an unguarded opening for that window. Builders have different ways of providing for window openings. Some might board over the required space while doing the roughing in until ready to insert the window sash, and then cut the opening; others might so arrange their material as to leave a partial opening for the window frames; while others might leave the opening the size of the required frame. How they did it would be no concern of the owner, but a mere matter of detail not affecting him, so long as the building when completed and turned over to him contained the windows called for by the contract.

Upon this view of the case we quote from *White v. Mayor etc.*, 15 App. Div. 440, 44 N. Y. Supp. 454:

"In actions of this nature the law looks to the proximate cause of the injury which is complained of; and, if that proximate cause is the result of the action of some independent person, the law looks no further to find a responsible agent who must answer for the injury which his act has caused."

Looking for the proximate cause of this injury, it is not hard to find it in the failure to guard the opening. Again, in the same case, it is said:

"Such liability can only exist where the work to be done is such that it is attended with danger, however skillfully and carefully it is performed, in which case, as the doing of the work itself is likely to produce an injury, the person who causes it to be done is held to be liable for what may be the natural consequences of the acts which he has set in motion."

It could hardly be said that putting windows in the front of a building and adjacent to the sidewalk was "attended with such danger, however skillfully and carefully it is performed." It would require no skill and but little care to have placed boards or other proper guards over this opening. The appellant might anticipate from its contract that this basement window would be provided by its contractor, but there was nothing in the contract, nor in the plans to which our attention has been called, from which it could anticipate that the contractor in putting in this window would necessarily create a dangerous opening; nor having created it, leave it unguarded.

In all the cases establishing liability on the part of the owner of the premises where the ordinary method of doing the work creates a nuisance, though the work be done by an independent contractor employing his own servants, it is held that such rule obtains only when the work itself is necessarily a nuisance and the injury results from the negligence of the contractor in the doing of such work. Wharton, Negligence, § 818.

"But building a house adjacent to a public street, with the usual and necessary excavations, . . . is not necessarily dangerous or hazardous, when done with reasonable and proper care; nor is such construction necessarily a nuisance." *City of Moline v. McKinnie, supra.*

We therefore conclude that the work done under this contract does not fall within any recognized exception to the general rule. The work was not in itself unlawful. The injury resulted, not from the act of performance, but from the manner of performance; it was not due to any defect in the plans; it was not due to the employment of an unskillful contractor, nor to one who did not have sufficient knowledge of the work to be performed to execute it in a proper manner, providing he used due care in its construction. The work itself was not inherently nor intrinsically dangerous; it was not a nuisance.

Appellant's motion for judgment at the close of the evidence should have been granted, and for such error the judgment is reversed, and the cause remanded with instructions to dismiss.

DUNBAR, C. J., and CROW, J., concur.

CHADWICK, J. (dissenting)—I dissent. Had the opening been in the sidewalk, plaintiff would recover under the authorities cited; the excavation would have been a nuisance against which the owner could not guard himself by letting a contract to an independent contractor. By the same rule, an owner should be held liable if the excavation is made upon the line of an open sidewalk. This is what was done in this case. The plans called for the cut-out which is placed under all show windows so that light and air may be admitted into the basement of the completed structure. The cut-out or opening was flush with the sidewalk. The rule is that, where an owner undertakes to do a work which in the ordinary mode of doing it is a nuisance, he is liable for any injuries which may result from it to third persons, though the work is done

by the contractor exercising independent employment and employing his own servants. It is only where such work, or the detail of it, is not in itself necessarily a nuisance that the exemption applies. This rule and the exception to it are noted in the cases cited in the majority opinion, and the distinction made is sustained by all the authorities. The liability of the owner, then, is measured by the condition, and not by the distance or exact location of the pitfall, if under the circumstances of the particular case, it is a menace to life or limb; unless the distance from the sidewalk was so great that reasonable minds would concur in holding that it was not a menace to life or limb, or, in other words, a nuisance.

In the instant case, I am unable to distinguish between the cases holding that an excavation or pit left in the sidewalk by an independent contractor will bind the owner, and the present case where the pitfall was flush with the edge of the sidewalk. The pedestrian is entitled to the whole of the walk, and to assume that he may step from one side to the other without danger. Therefore, the excavation being a nuisance in itself, the owner should not be allowed to claim exemption from damages merely because it was created by the contractor who followed the plans and specifications. The owner is bound to furnish proper plans and specifications; and admitting that the contractor left the cut-out under the show window, and that it was in accordance with the plans and specifications, it would be a defect therein within the meaning of the term as applied in cases like this, and the appellant should be held under the general rules announced in the majority opinion. *Robbins v. Chicago*, 71 U. S. 657, states the law applicable to this case and it should be followed.

[No. 9111. Department One. March 10, 1911.]

ROBERT A. EATON, *Respondent*, v. GENERAL COMPRESSED AIR & VACUUM MACHINERY COMPANY, *Appellant*.[1]

PLEADING—AMENDMENT—DISCRETION. It is not an abuse of discretion to refuse leave to amend an answer at the trial by substituting a general denial for certain admissions respecting a contract alleged in the complaint, where the action had been pending several months, the case had been regularly set for trial, and a jury empaneled to try the case.

PLEADING—VARIANCE—CONTRACT—CONSTRUCTION. In an action upon a contract to recover "10 per cent on any business" done for the defendant, it is not a failure of proof or a material variance to prove a contract by defendant's letters for "a commission of ten per cent on all goods of our manufacture" where in another letter "ten per cent on any business you secure for us" was stated to mean "ten per cent to you on all goods of our manufacture."

CONTRACTS—ACTION FOR BREACH—EVIDENCE—QUESTION FOR COURT. In an action on contract for services, a verdict for the plaintiff is properly directed, where the contract was admitted and the defendant's evidence showed the amount due thereon to be substantially the sum found by the court.

Appeal from a judgment of the superior court for King county, Joiner, J., entered April 30, 1910, upon the verdict of a jury rendered in favor of the plaintiff by direction of the court, in an action on contract. Affirmed.

Peters & Powell, for appellant.

Hamlin, Meier & Phillips (*W. F. Meier*, of counsel), for respondent.

MOUNT, J.—Plaintiff brought this action against the defendant to recover upon two alleged causes of action. For the first cause the plaintiff alleged, that he entered into a written contract with the defendant by which defendant agreed to pay him ten per cent of all business which he might secure for defendant; that he secured a contract for

[1]Reported in 113 Pac. 1091.

defendant to install one of its vacuum cleaning plants in the New York block in the city of Seattle, for the price of $2,725, which plant was installed in said building, and that his commission thereon amounted to $272.50. For a second cause of action plaintiff alleged, that he entered into a parol contract with defendant to install the said vacuum cleaning plant in the New York block, and as compensation therefor was to receive the difference between the contract price and the gross factory price, with freight and shipping charges and all expenses of installation upon the premises of the purchaser; that the contract price was $2,725, and the gross factory price was $1,872.50; that the reasonable cost of transportation, installation, etc., was $425, leaving the sum of $427.50 for the plaintiff's profit. He further alleges that he undertook to install the plant as agreed, but that defendant thereafter wrongfully interfered and prohibited him from completing the work, which he was ready, able, and willing to do, and that the defendant thereby became indebted to him in the sum of $427.50; and demanded judgment upon the first cause of action for $272.50, with interest from March 14, 1909, and upon the second cause for $427.50, with interest from August 7, 1909.

For answer to the complaint, the defendant denied the allegations of the first cause of action. Defendant admitted the contract alleged in the second cause of action, and admitted that it superseded and set aside the plaintiff from the work, and employed other workmen to install the plant; and denied that the plaintiff was ready, able, or willing to complete such installation, but alleged that the plaintiff failed, neglected and refused to properly or effectually install the plant; and denied any indebtedness to the plaintiff on account of such installation. As a further and affirmative defense, the defendant alleged that, upon the representation of the plaintiff that he was a competent engineer, the defendant employed him to superintend the installation of the said plant, which he undertook to do; but that he proceeded so carelessly

and negligently with such work, and was so incapable of doing the work, that defendant was required to go to much expense to secure the proper installation and supervision thereof by others, to its damage in the sum of $500. These affirmative allegations were denied by the plaintiff. Upon these issues the case came on for trial. After a jury had been impaneled, counsel for the defendant asked leave of the court to amend its answer to the second cause of action by filing a general denial thereof. Counsel stated that the defendant was a nonresident of the state; that he had been misinformed by an agent of the defendant as to the facts pleaded; that depositions of the officers of the defendant had been taken, which depositions had arrived only the day before, and that such depositions, instead of admitting the contract to install the cleaning plant, denied the same. Counsel offered to pay the costs of a continuance, to which plaintiff objected, and the court refused the request.

Appellant now urges that the court abused its discretion in this ruling. The action had been pending for several months, the case had been regularly set down for trial, and the jury had been impaneled to try the case. We are of the opinion that the court did not abuse its discretion in refusing to change the issues at that time, under the circumstances stated.

At the close of all the evidence in the case, the trial court refused defendant's motion for a nonsuit, and directed a verdict for the plaintiff in the sum of $711.81. Appellant argues that the motion for a nonsuit as to the first cause of action should have been granted, for the reason that the complaint alleged a contract for the payment of "10 per cent on any business which the plaintiff might secure for the defendant," while the proof shows a contract for "a commission of ten per cent to you on all goods of our manufacture," and that there was a fatal variance which amounted to a failure of proof. There is no merit in his contention. The contract was made by letters passing between the parties. In one

of these letters from defendant to plaintiff, it is stated: "We will pay you ten per cent on whatever business you do for us." In a subsequent letter defendant said to plaintiff: "The usual commission of ten per cent to you on all goods of our manufacture." The plaintiff made objections to this last statement, and in reply the defendant said: "We will pay you ten per cent on any business you secure for us, which means ten per cent on goods of our own manufacture, but you may rest assured that in plants up to six-sweeper capacity, we manufacture everything except motor and hose." It was conceded that the plant in question was of five-sweeper capacity and no motor was used. The hose was of little importance, and the cost thereof was apparently deducted by the court. It is apparent that the contract was proved substantially as alleged. The fact that the plaintiff asked leave to amend his complaint to conform to the proof is of no importance to show a variance. He no doubt did so to avoid the question raised.

Appellant argues that, upon the second cause of action, there was a conflict of evidence upon the cost of installing the plant, and therefore that question should have been submitted to the jury. But there appears to be no substantial conflict therein. The evidence offered by the defendant showed that the cost of installing the plant was, $205 for labor, $172.89 for freight charges, $31.85 for expressage, $25 for painting; making a total of $434.74, which added to the estimated factory price, makes the total cost of $2,307.24, which deducted from the contract price—$2,725, leaves a balance of $417.76, which would have been the plaintiff's profit. This is substantially the sum allowed by the court. It is true, the defendant testified that it let a contract for $450 for installing the plant. But the contract included the contractor's profit, which justly belonged to the plaintiff. The court properly refused to consider the cost of valves, pipes, etc., because those things clearly were a part of the plant which the defendant was required to furnish.

We find no reversible error in the record, and the judgment is therefore affirmed.

DUNBAR, C. J., PARKER, GOSE, and MORRIS, JJ., concur.

[No. 9160. Department One. March 10, 1911.]

GEORGE E. HEWITT, *Respondent*, v. THE CITY OF SEATTLE, *Appellant*.[1]

MUNICIPAL CORPORATIONS—TORTS—LIABILITY—STREETS—ACTS OF OFFICERS—STREET SUPERINTENDENT. The duty of a city to keep its streets in repair not being a governmental but a ministerial duty, liability for breach is not limited to defects or obstructions, but the city is liable to a pedestrian negligently run down and injured by its superintendent of streets while driving an automobile in the performance of his duty.

APPEAL—REVIEW—HARMLESS ERROR—COMMENT ON FACTS. Error, if any, in commenting upon evidence relating to the filing of a claim is not prejudicial where there was no issue at the trial in relation thereto and the evidence was undisputed.

SAME—ADMISSION OF EVIDENCE. Error in admitting plaintiff's evidence of the declaration of defendant's agent to prove his agency is cured where the agent was called as a witness by defendant and corroborated the statement by testifying to the same thing.

Appeal from a judgment of the superior court for King county, Gay, J., entered March 11, 1910, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a pedestrian run down by an automobile. Affirmed.

Scott Calhoun and *James E. Bradford*, for appellant.

Hughes, McMicken, Dovell & Ramsey and *Otto B. Rupp*, for respondent.

DUNBAR, C. J.—In the afternoon of October 2, 1908, while the respondent was crossing Third avenue, one of the main prominent thoroughfares in the city of Seattle, near its inter-

[1]Reported in 113 Pac. 1084.

section with James street, he was run over by an automobile driven by one Maloney, who was superintendent of the street department of the city of Seattle, and received the injuries of which he complains. At the time of the accident, Maloney was in the performance of his duty as such superintendent. In his complaint, after stating the facts, respondent alleges negligence on the part of the city through its agent Maloney, and that the automobile was being driven at an unlawful rate of speed, and sues for damages. Verdict was rendered for $1,500, judgment was entered thereon, and appeal followed.

We shall not undertake to discuss *seriatim* the assignments in this case. They are numerous. The first contention is that the city is not liable in any event for the negligence of the superintendent of streets. This is a much discussed question. It has been settled by a great weight of authority that the duties imposed upon municipal corporations are dual; that one is of that kind which arises from the grant of a special power in the exercise of which a municipality is as a legal individual; the other is of that kind which arises or is implied from the use of political rights under the general law in the exercise of which it is as a sovereign. The appellant cites many cases to support its contention that the city should not respond to damages in any event, and that in the construction and keeping in order of its streets it was acting in a governmental capacity, and therefore not liable to a suit for damages. Speaking on this question, it is said on page 1280 of Dillon, Municipal Corporations (4th ed.), in discussing the liabilities of cities concerning bridges, sidewalks, and streets, repairing the same and keeping them in safe condition:

"This duty or burden must appear, upon a fair view of the charter or statutes, to be imposed or rest upon the municipal corporation, as such, and not upon it as an agency of the state, or upon its officers as independent public officers. (This, however, in general appears sufficiently where the municipality sought to be made liable exists under a special charter or general act which confers upon it peculiar powers and

privileges as respects streets, their control and improvement, not possessed throughout the state at large under its general enactments concerning ways)."

And it is said by Shearman & Redfield, Law of Negligence, § 289:

"With few exceptions, the courts of all the states agree that, as at common law, no civil liability rests upon counties and other quasi-corporations, for neglect to keep their highways in a reasonable state of repair, unless such liability is expressly imposed by statute. But in respect of cities, towns and villages, incorporated either by special charter, or under a general statute, the principle is firmly established, by the decisions of the Federal courts, and by those of all the state courts where the question has been properly open for discussion, except these mentioned below, that such corporations, where the statute grants them the control of their streets, coupled with powers to raise means to maintain them, are bound to exercise ordinary care and diligence to see that they are reasonably safe for travel; that this duty is not a public duty owing to the public alone, but a private, corporate duty, which (when not expressly imposed) is necessarily implied from such a grant of power; and, moreover, that the legislature is deemed to have intended by the grant to impose a liability, co-extensive with the duty, in favor of any person, specially injured by a wrongful omission to perform, or a negligent performance of, such duty."

Outside of the overwhelming weight of authority to this effect, this court has uniformly maintained that doctrine. In *Sutton v. Snohomish*, 11 Wash. 24, 39 Pac. 273, 48 Am. St. 847, we decided that the duty of a city to keep streets in repair was not a governmental but a ministerial duty, and for a breach thereof an action will lie in favor of a person injured as a result of such negligence. In the course of the opinion it was said:

"There is undoubtedly a want of harmony among the decisions of the courts upon this question, but we believe the decided weight of authority, as well as sound reason, is in favor of the view above expressed;"

citing many leading cases to sustain the announcement.

This case was followed with approbation in *Saylor v. Montesano*, 11 Wash. 328, 39 Pac. 653; *Lorence v. Ellensburgh*, 13 Wash. 341, 43 Pac. 20, 52 Am. St. 42; *Mischke v. Seattle*, 26 Wash. 616, 67 Pac. 357; *Brabon v. Seattle*, 29 Wash. 6, 69 Pac. 365; *Prather v. Spokane*, 29 Wash. 549, 70 Pac. 55, 92 Am. St. 923, 59 L. R. A. 346; *Shearer v. Buckley*, 31 Wash. 370, 72 Pac. 76; and the latest expression of this court on that subject announcing the same view is *Hayes v. Vancouver*, 61 Wash. 536, 112 Pac. 498. So that, in view of the uniform decisions of this court on that question, we do not feel called upon to again enter into a discussion of the principles involved.

It is, however, additionally contended by the appellant that, conceding the doctrine that cities are responsible for the safe condition of the streets, such implied liability is limited to structural defects or obstructions thereon, and does not reach to damages that flow from operations of any kind upon the street; and many cases are cited to sustain this distinction. But we have been unable from a perusal of those cases to determine that they are in point. In note to *Dudley v. Flemingsburg*, 1 Am. & Eng. Ann. Cases, 960 (115 Ky. 5, 72 S. W. 327, 60 L. R. A. 575), which is cited by the appellant, it is said:

"The improper condition of a street or highway which gives rise to municipal liability therefor must be some inert matter encumbering the highway or some structural defect therein. An improper or unlawful use of the highways by persons, animals, vehicles, engines, or objects, while movable or actually being moved by human will or direction, and neither fixed nor stationary in one position within the highway, does not render a municipality liable."

A superficial interpretation of this announcement might seem to bear out the appellant's contention. But an examination of the cases cited shows that the question presented in this case was not the question which was passed upon by the courts in the case cited in the note. In those cases the

negligence alleged was not the negligence of the city in doing the thing which was the cause of the injury, but negligence of the city in permitting some one over whom the city had no control to act negligently. The first case cited by the author under the note mentioned is *Faulkner v. Aurora*, 85 Ind. 130, 44 Am. Rep. 1. That was where an ordinance had been adopted by the city prohibiting coasting upon the streets, and a traveler was injured by coming in contact with some one who was indulging in the sport of coasting, but not any one that was in any sense or manner an agent of the city or authorized to act for the city in any capacity whatever. The court, in passing upon the question raised, said:

"Those who injured the appellant were in no way connected with the appellee; they acted upon their own volition, and carried on their sport for their own pleasure, not for the benefit of the appellee, nor at its instance."

In this case, of course, if the contention of the respondent is correct—and in fact there seems to be no denial of that fact—the party who was driving the automobile was an agent of the city, and was driving the automobile as an agent of the city, and was driving it in the performance of his duty as an agent of the city. The next case cited is *Davis v. Bangor*, 42 Me. 522, where A. was driving his horse harnessed to a chaise, over a bridge, the horse took fright at a tree on a wagon which was standing there temporarily in charge of the driver, ran away, overturned the chaise and injured A., and it was held that the town was not liable therefor either civilly or criminally; a case which does not involve in any way the question at issue, for the party who maintained the wagon and the tree was a stranger to the city. A reading of the whole case convinces us that the decision does not in any way militate against the doctrine of liability of the city in such a case as the one under discussion. In *Hixon v. Lowell*, 13 Gray 58, the court held that a city was not liable for an injury caused to a foot passenger on a sidewalk which the city is bound to keep in repair, by the

falling of an overhanging mass of snow and ice from the roof of a building not owned by the city. *Barber v. Roxbury*, 11 Allen 318, is a case where a rope stretched across a highway above the ground and attached at each end to objects which were outside of the limits of the highway and in temporary use, was held not to be a defect or want of repair in the highway for which a city would be liable to a traveler who received an injury by coming into collision with it while it was in motion from human agency. This case is somewhat obscure, but we think it is reasonably evident from the opinion that this human agency which is spoken of by the court was an agency entirely outside of the authority of the city. *Jones v. Williamsburg*, 97 Va. 722, 34 S. E. 883, 47 L. R. A. 294, is a case where the plaintiff was struck and injured by a bicycle, which was being ridden upon the sidewalk of one of the streets of the defendant corporation, and brought his action to recover damages against the city for his injury. In this case, as in the others, the party who was the cause of the injury was not claimed to be an agent of the municipality.

There *are* cases, though, holding that there is no distinction such as is sought to be applied by the appellant. *Barney Dumping-Boat Co. v. Mayor etc. of New York*, 40 Fed. 50, was where an officer of the city had the custody of a tug, and in the negligent operation of the tug, in the performance of his duty of keeping the streets cleaned and removing refuse, injured the plaintiff. It was held that the officer was not an officer of the general public but of the city; that his duties, unlike those of the departments of health, charities, fire, and police, which are held to be governmental employments, although performed incidentally in the interest of the public health, are more immediately performed in the interest of the corporation itself, and that the city was responsible. The same doctrine was laid down in *Missano v. New York*, 160 N. Y. 123, 54 N. E. 744. This action was brought to recover damages for the death of a

child who was run over and killed by a horse attached to an ash cart of the street cleaning department of the defendant, a case which cannot be distinguished in its facts from the case at bar; and it was held that the city was liable because acting, in relation to the care of the streets, in the discharge of a special power granted to it by the legislature, in the exercise of which it is a legal individual as distinguished from its governmental functions, where its acts were the acts of a sovereign. *Shaw v. New York*, 83 App. Div. 212, 82 N. Y. Supp. 44, was another case where the act of negligence charged was that the defendant's servants and employees in a street cleaning department carelessly and negligently drove and managed a horse and wagon which was in the custody and control of defendant and in pursuance of the business of defendant; that by reason thereof, he permitted the horse to remain on the street without being guarded or tied, whereby said horse ran away, and said horse and wagon struck plaintiff's wagon, etc., and the cause of action was sustained. To the same effect are: *Winona v. Botzet*, 169 Fed. 321; *Workman v. Mayor etc. of New York*, 63 Fed. 298; *Workman v. New York City*, 179 U. S. 552.

There is an attempt upon the part of the appellant in his reply brief to distinguish these cases, but we think not a successful one. They laid down the rule contended for by the respondent, and from our investigations we are unable to ascertain that any court has sustained the distinction which is urged by the appellant. This was an act of misfeasance done in the course of the servant's ordinary employment in the service of his master, and the doctrine of *respondeat superior* obtains.

In the course of its charge to the jury, the court instructed as follows:

"(12) Then in paragraph 5 of the complaint, it is alleged that they filed a certain claim which the ordinance and charter of the city of Seattle requires to be filed before a case can be prosecuted in our courts, but without objection,

and I imagine there is no evidence to the contrary—which has been admitted in here and before you and in your presence, there has been put a copy of a claim which shows that in regular and legal form the claim was in truth and in fact presented, but it was of course in the ordinary formal pleading papers denied, but you need not waste any time upon that."

This instruction is assigned as error, the contention being that it constituted a comment upon the testimony, in contravention of § 16, art. 4, of the constitution, which is to the effect that judges shall not charge juries with respect to matter of fact, nor comment thereon, but shall declare the law. This instruction, while perhaps a little irregular, does not instruct the jury with reference to any real issue, for while the question of the filing of the claim was made an issue under the pleadings, it was not an issue on the trial of the cause, and the testimony in relation to the filing of the claim was undisputed. A copy of the claim was introduced without objection, and appears in the record here, so that no prejudice could possibly have arisen from the instruction of the court in this regard.

It is also contended that the court erred in allowing respondent, over appellant's objection, to testify that the driver of the automobile told him, shortly after the accident occurred, that he was superintendent of streets; that the automobile belonged to the city, and that he was at the time going to repair the defect in the streets, for the reason, as alleged, that the declaration of the agent is not admissible to establish his agency; and it is said that no other evidence was introduced in support of such agency. This statement may be correct so far as the plaintiff's testimony is concerned, and that is probably what learned counsel means to state; but it is not necessary to discuss the legal point involved in counsel's objection to the admission of the testimony offered by it in defense, for when appellant's witness, the driver of the automobile above referred to, was asked in chief if he had

seen the respondent at the time testified to by the respondent, he said he had, and in answer to the following question, "What, if anything, did you say there at the time relative to the matter to which he testified?" he answered as follows: "I think what he said was about right; that I said I was street superintendent, and I was sorry the accident happened." Not having rested on his motion for a nonsuit, and having supplied the legal proof of agency, the error of the court, if any, in admitting the illegal proof of agency, was cured. *Dimuria v. Seattle Transfer Co.*, 50 Wash. 633, 97 Pac. 657, 22 L. R. A. (N. S.) 471.

We are unable to find any reversible error in the admission or rejection of testimony, or in the giving or refusing to give instructions. The questions of negligence and contributory negligence were legally submitted to the jury; and no error appearing, the judgment is affirmed.

MOUNT, PARKER, GOSE, and MORRIS, JJ., concur.

[No. 9306. Department One. March 10, 1911.]

SEDRO VENEER COMPANY, *Appellant* v. F. J. KWAPIL, *Respondent*.[1]

SALES—BREACH OF CONTRACT—DAMAGES. Where the seller breached a contract to furnish twenty-five car loads of egg case shooks for resale to eastern customers of the buyer, a jobber, who subsequently *bona fide* resold all of the same at a profit and was unable to fill the orders, the measure of damages is the net profit the buyer would have made, and not the difference between the contract and the market price; since the prospective profits were reasonably within the contemplation of the parties, although he had made no resales when the contract was made.

SAME—MITIGATION OF DAMAGES—BURDEN OF PROOF. In an action for damages for breach of a contract to furnish egg case shooks to a jobber for resale, the burden is upon the defendant to show that the buyer could have purchased the shooks elsewhere.

[1]Reported in 113 Pac. 1100.

SAME—DAMAGES—PROSPECTIVE PROFITS—EVIDENCE—SUFFICIENCY. The evidence shows with sufficient certainty loss of prospective profits on contemplated resales of twenty-five car loads of egg case shooks, where it appears that he made *bona fide* resales thereof to his customers at a net profit of $100 per car.

FRAUDS, STATUTE OF—SALE OF GOODS—DELIVERY OF PART—PART PAYMENT. An oral modification of a written contract of sale of goods is not void under the statute of frauds, where, within the exception of Rem. & Bal. Code, § 5290, the purchaser "received and accepted part of the goods" and paid for the same.

SALES—BREACH—DEFENSES—NONPAYMENT. The seller of goods cannot avoid liability for breach of a contract by reason of the purchaser's failure to pay a balance due on goods delivered, where that was not assigned as a reason for failure to perform until after the damage to the buyer had already accrued.

SAME—ESTOPPEL. Breach of a seller's contract to fill orders of the buyer for a certain quantity of goods is not excused by the buyer's failure to file the orders within the time contemplated by the contract, where the seller was then behind in filling the orders already filed, and thereafter the parties proceeded with the contract.

Appeal from a judgment of the superior court for King county, Tallman, J., entered November 16, 1910, upon the verdict of a jury rendered in favor of the defendant, in an action on contract. Affirmed.

Million & Houser and *George Friend*, for appellant.

John E. Ryan and *Grover E. Desmond*, for respondent.

PARKER, J.—The plaintiff commenced this action to recover from the defendant a balance of $517 upon the purchase price of two car loads of egg case shooks. The defendant did not deny the sale or the amount of the balance alleged to be due thereon; but alleged, as an affirmative defense and counterclaim, a failure on the part of the plaintiff to furnish twenty car loads of shooks in accordance with a contract between the parties, and that by reason of such failure, the defendant was damaged by loss of profits thereon in the sum of $2,000, for which sum, less the $517, he demanded judgment against the plaintiff. A trial before the

court and a jury resulted in a verdict and judgment in defendant's favor for $1,000. The plaintiff has appealed.

The appellant is a manufacturer of box shooks and other wood products, in Skagit county. Respondent is engaged in selling box shooks as a jobber, to the trade in the middle western states. His place of business is at Seattle. On October 9, 1908, a contract was entered into between the parties by which appellant was to manufacture and furnish to respondent twenty-five car loads of egg case shooks to supply his trade in the middle western states. This contract is in writing, and so far as necessary for us to notice its provisions, they are as follows:

"BUYERS AND SELLERS CONTRACT.

"This contract, made and entered into this 9th day of October, 1908, by and between the Sedro Veneer Company, a corporation doing business at Sedro, Washington, hereinafter to be known as the 'Seller,' and F. J. Kwapil & Company, of Seattle, Washington, hereinafter to be known as the 'Buyer.'

"Witnesseth: as follows to wit: For and in consideration of the conditions and agreements hereinafter named, the 'seller' agrees to ship to the order of the 'buyer' (25) twenty-five car-loads of egg case shooks to be manufactured from cottonwood, as per the following specifications, all lumber to be thoroughly dry and free from rot:

"Car loads as follows: 2 sawed ends 7-16" x 11¾" x 12½ SIS 1 piece or 2 piece cleat.

"1 sawed ctr. 7-16" x 12½" x 11¾" rgh 1 or 2 piece.

"4 sawed cleats 7-16" x 1-3" x 11¾" SIS 1 piece.

"2 veneered sides 3-16" x 12½-8 x 25" 1 piece.

"1 veneered top 3-16" x 11¾" x 26" 1 piece.

"1 veneered bottom 3-16" x 11¾" x 25" 1 or 2 piece. . .

"All shipments are to be made by rail, and are to be loaded on cars by and at a shipping station of the 'seller' subject to the orders filed by the 'buyer.' The 'buyer' to have enough orders filed on or before January 20th 1909 for at least one-half of this contract. Shipments to extend from date above mentioned until July 1, 1909.

"The 'buyer' agrees to pay the 'seller' ($8) eight dollars per hundred for all cases ordered and shipped, manufactured

with the spruce ends, centers and cleats, said number of cars of this class of stock not to exceed 50 per cent of this contract: And ($8.60) eight and 60-100 dollars per hundred cases manufactured with cottonwood ends, centers and cleats. Said prices to be net cash f. o. b. 'seller's' mill, to be paid either by 'buyer's' checks or sight draft drawn by 'seller' on 'buyer' at Seattle. All freight charges to be paid by the 'buyer.'

"If the 'seller' turns out more than the above number of cars, 'buyer' is to have the first option on same.

"Conditions of this contract are such that the 'seller' shall not be held responsible for delivery of said egg cases if prevented by log shortage, strikes, car shortage, the elements or other unavoidable causes beyond the 'seller's' control."

Soon thereafter appellant furnished to respondent samples of the shooks, to be exhibited to his customers. He then proceeded to the middle western states and visted his customers, and succeeded in entering into contracts of sale with them for egg case shooks sufficient to consume the entire amount contracted for with appellant, within the time fixed by the contract for furnishing them by appellant. Only five car loads of the shooks were ever furnished by the appellant, the two car loads sued upon being among those so furnished, though appellant was repeatedly urged by respondent to furnish others. Because of appellant's failure to furnish others when requested so to do, from time to time, respondent's customers cancelled their orders and he lost his profits upon the orders so cancelled. Respondent's net profits upon his sales to his customers would have been approximately $100 per car had appellant furnished the shooks as contracted for so that his sales could have been consummated. While respondent did not have any sales with his customers contracted for at the time of making the contract with appellant, we think the evidence renders it certain that appellant did then know that respondent was contracting for the shooks to sell them to his customers in the middle western states, at a profit, during the time covered by the contract.

There seems to be no dispute upon this question, and the trial court, in giving its instructions upon the measure of damages, assumed this to be true, as we think it was warranted in doing.

It is contended by learned counsel for appellant that the court erred in its instructions to the jury upon the measure of damages. The substance of these instructions was, that if the jury should find that the respondent had made *bona fide* sales of the shooks to his customers, and he was prevented from completing such sales by the failure of appellant to furnish the shooks according to the contract, then the measure of respondent's damages would be the difference between the price he was to pay appellant and the price at which he contracted to resell the shooks to his customers, less the expense incident to the delivering of them to his customers. In other words, that his measure of damages would be the net profits he would have made upon his sales had he been able to deliver the shooks but for the failure of appellant to furnish them as contracted for.

It is insisted that the only measure of damages that respondent can invoke is the difference between the contract price and the market price at the place of delivery under the contract, which was the "station of the seller," evidently meaning at the railway station near appellant's factory; and that, "The only exception to the rule that the measure of damage is the difference between the contract price and the market price is where the purchaser has contracted for the resale, the existence of which contract is known to the vendor at the time of making the contract, and then only is the vendor liable when the profits on the resale are reasonable." These contentions seem to be rested upon the fact that respondent did not have any contracts with his customers for the resale of the shooks at the time of contracting for them with appellant, from which it is argued that appellant could not then have contemplated any profits to be made by respondent upon resale of the shooks, and that the prospective

profits upon resale by respondent were too remote and speculative to be a proper measure of damages. We think that the measure of damages in such cases is not restricted within the narrow limits insisted upon by counsel. The general rule of measure of damages growing out of a broken contract is stated in the leading English case of *Hadley v. Baxendale*, 9 Exch. 341, 353, as follows:

"Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i. e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract."

This is probably as comprehensive a statement of the general rule as can be found in any of the authorities, and but few statements of general principles have been more uniformly approved by the courts. Now can the loss of respondent's profits upon resale of the shooks by him "reasonably be supposed to have been in the contemplation of both parties, at the time that they made the contract, as the probable result of the breach of it." It seems to us that there can be but one answer to this question, and that in the affirmative. It is clear from this record that appellant knew

that respondent was entering into the contract for the purpose of reselling the shooks to his customers in the middle western states, to the end that he would make a profit thereby. We are not here concerned with the question of unreasonable profits. It is not contended that respondent's prospective profits, which he lost because of appellant's failure to furnish the shooks, are unreasonable in amount, but only that such profits could not have been within the contemplation of the parties because no resales were then contracted for by respondent, and hence, at that time, could not have been a basis upon which the amount of such profits could be determined with any degree of accuracy, and that, therefore, the market value at the place where the shooks were to be delivered under the contract was the only proper measure of damages. There would be reason in this contention, so far as the amount of the profits is concerned, if no resale contracts had ever been made by respondent, furnishing a basis for determining the amount of his prospective profits. It seems to us, in this connection, that the thing which we are to determine is, did both parties, at the time of making the contract, have in mind and contemplate the making of a profit by respondent by a resale of the shooks? and not, whether or not they had in mind any particular amount of such profits. Clearly, appellant then knew that a failure to furnish the shooks would probably result in loss of profits to respondent. The fact that there were then no actual sales made by respondent, and therefore no existing basis upon which the amount of his profit could be determined, does not render any less certain the fact that the parties then had in mind the probability of future profits to respondent from a resale of the shooks. It is beyond controversy that appellant knew at the time that that was the sole inducement prompting respondent to contract for the shooks. The question of whether or not such prospective profits are too uncertain in amount to become a measure of damages in place of market value, when damages arise upon a breach of such a contract, has more to do with

the question of proof of the amount of such damages than with the question of the parties contemplating the probable making of profits by the purchaser, as we will see later. In the case of *Trigg v. Clay*, 88 Va. 330, 13 S. E. 434, 29 Am. St. 723, we find a situation quite similar to that here involved, lumber being purchased for the purpose of reselling in the market, and damages claimed from the seller because of a failure to furnish the lumber. At pp. 334-335, Justice Lacy, speaking for the court, says:

"A distinction is drawn in some of the cases between a resale made at an advance subsequent to a contract of purchase, and a resale made at an advance before the contract of purchase, which was known to the seller of the goods. *Carpenter v. First National Bank*, 119 Ill. 354.

"This is rather a fanciful distinction. It is not in accord with the ordinary usages of trade that a dealer—a man buying to sell again—should disclose his dealings with the same goods at a profit to his vendor. But if there were any sound principle upon which this could rest—if the seller could be supposed to enter into his contract upon the basis of a resale in which he had no interest—still in this case it is reasonable to suppose that a lumber-getter, selling 700,000 feet of lumber to a dealer in lumber, should know (1) that it was for a resale; (2) that this resale was to be on a profit, and (3) that he should know that his vendee would be damaged to the amount of his profit if the vendor should prove faithless. . . .

"Profits or advantages which are the direct and immediate fruits of the contract, entered into between the parties, are part and parcel of the contract itself, entering into and constituting a portion of its very elements, something stipulated for, and the right to the enjoyment of which is just as clear and plain as to the fulfilment of any other stipulation. They are presumed to have been taken into consideration and deliberated upon before the contract was made, and formed perhaps the only inducement to the arrangement. If the inducement to the plaintiffs to buy this lumber, they being lumber dealers and trading in lumber, was not the profits they were to make by a resale, what was their inducement? And if the sellers did not understand and contem-

plate this resale on a profit, what contemplation on the subject can be reasonably ascribed to them? See *Masterlon v. Mayor of Brooklyn*, 7 Hill (N. Y.), 62; *Morrison v. Lovejoy*, 6 Minn. 224; *Fox v. Harding*, 7 Cush. (Mass.), 516; *Devlin v. Mayor &c.*, 63 N. Y. 8; *McAndrews v Tippitt*, 39 N. J. 105; *Kendall Bank Note Co. v. Commissioners of the Sinking Fund*, 79 Va. 563; *Bell v. Reynolds*, 78 Ala. 511.

"An examination of the cases will show that the courts have been endeavoring to establish rules by the application of which a party will be compensated for the loss sustained by the breach of contract—in other words, for the benefits and gain he would have realized from its performance, and nothing more."

It may be suggested that the fact that there was no market at which the purchaser in that case could procure lumber of the kind contracted for, permitted him to prove his damages by his loss of profits rather than market value. It is true that in the case before us we have no evidence of respondent's inability to procure shooks for his customers by purchasing them elsewhere, but it seems to us that if respondent could have so purchased shooks to supply his customers to the extent of the sales he had made to them, the burden was upon appellant to prove such fact. The opinion in *Trigg v. Clay, supra*, so indicates at page 333. It is true that respondent did purchase one car of shooks elsewhere to supply one of his customers, but that does not prove that he could have procured any more elsewhere. He had a right to rely upon the contract with the appellant; and when appellant breached the contract and thus prevented respondent from supplying his customers, it seems to us it would be more just to require appellant to prove that respondent could have procured the shooks elsewhere than to require respondent to prove that he could not do so. As to the one car load which he did procure elsewhere, it is evident that the jury did not award him any damages for loss of profits upon the sale supplied by that car. We think that respondent is not to be prevented from recovering damages,

measured by the loss of his prospective profits, by the mere fact that he did not have the resale of the shooks actually contracted for at the time of making the contract with appellant, and this brings us to the question of whether or not respondent is able to prove the amount of his prospective profit with sufficient certainty that the law will recognize their amount as a proper measure of damages. The certainty of the amount of such profits seems to be the principle thing in determining whether or not the law will regard them as a proper measure. If their loss is a proximate result of the breach of the contract, and they are not unreasonable in amount, and their amount can be proven with reasonable certainty, they are as proper a measure of damages as any other measurable loss resulting from a breach of the contract. The question here is, shall the prospective profits be excluded as a measure of damage because of their uncertainty? In the case of *Griffin v. Colver*, 16 N. Y. 489, 491, 69 Am. Dec. 718, Justice Sheldon, speaking for the court, said:

"It is a well established rule of the common law that the damages to be recovered for a breach of contract must be shown with certainty, and not left to speculation or conjecture; and it is under this rule that profits are excluded from the estimate of damages in such cases, and not because there is anything in their nature which should *per se* prevent their allowance. Profits which would certainly have been realized but for the defendant's default are recoverable; those which are speculative or contingent are not."

It is true that in that case the prospective profits were rejected as a measure of damages, but only because their amount was not capable of determination with any degree of certainty. In the same opinion, page 494, the learned justice quotes approvingly from an early edition of Sedgwick on Damages, as follows:

"The broad, general rule in such cases is, that the party injured is entitled to recover all his damages, including gains prevented as well as losses sustained; and this rule is subject

to but two conditions: The damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract, that is, must be such as might naturally be expected to follow its violation; and they must be certain, both in their nature and in respect to the cause from which they proceed."

Mr. Freeman has a valuable note to this case in 69 Am. Dec. 724.

In 1 Sedgwick on Damages (8th ed.), § 174, the learned author says:

"The allowance of profits, when not excluded as unnatural or remote, is wholly a question of the certainty of proof. Wherever there is an interference with, or withholding of property, or breach of contract, or commission of a tort, the gain prevented, if provable, may be recovered. . . . We shall find that whenever expected profits become capable of certain proof, then they can be recovered."

See, also, 1 Sutherland on Damages (3d ed.), §§ 59 and 60; *Wolf Co. v. Galbraith*, 35 Tex. Civ. App. 505, 80 S. W. 848; *Chisholm & Moore Mfg. Co. v. United States Canopy Co.*, 111 Tenn. 202, 77 S. W. 1062.

We think that when respondent proved actual *bona fide* sales of the shooks which appellant had contracted to furnish him, there was thereby furnished a basis upon which the amount of his net profits could be determined by the jury with a sufficient degree of certainty to satisfy the conditions under which such profits become a proper measure of damage. The evidence was sufficient to warrant the jury in believing that *bona fide* sales had been contracted for by respondent sufficient to consume all of the shooks agreed to be furnished him under the contract with appellant, and that he was prevented from consummating such sales by appellant's failure to furnish the shooks under the contract. We are of opinion that the court was not in error in allowing the jury to measure respondent's damages by the amount of profits lost to him by appellant's breach of the contract.

It is contended that the court should have rendered judgment for appellant notwithstanding the verdict, upon motion therefor, because it appeared by respondent's evidence that, soon after the making of the written contract, the parties orally agreed that the specifications in the contract might be considered as modified to the extent that respondent should take under the contract as many panel ends as he could sell in place of the sawed ends. These panel ends were made somewhat differently from the sawed ends specified, but they served the same purpose. It is argued that this evidence showed that the contract as finally made between the parties became in effect an oral contract, and hence, void and unenforceable under the statute of frauds, because of the amount involved. This contention is evidently rested upon Rem. & Bal. Code, § 5290, which reads as follows:

"No contract for the sale of any goods, wares, or merchandise, for the price of fifty dollars or more, shall be good and valid, unless the purchaser shall accept and receive part of the goods so sold, or shall give something in earnest to bind the bargain, or in part payment, or unless some note or memorandum in writing of the bargain be made and signed by the party to be charged thereby, or by some person thereunto by him lawfully authorized."

It might well be argued that this change in the specifications was too slight to be regarded as such a change in the written contract as to make it in effect a new oral one. But there was another fact shown by the record that we think saves the contract from the statute above quoted. It clearly appears that a considerable number of panel ends were furnished by appellant to respondent and paid for in compliance with this understanding. This, we think, is sufficient in any event to prevent the contract becoming void under this statute.

It is contended that appellant's motion for judgment notwithstanding the verdict should have been granted, because appellant was not required to furnish any more shooks after

it had declined to do so because of respondent's failure to pay the balance due on those already furnished. The earliest date shown by the record when appellant assigned this as a reason for not furnishing more shooks was June 21st, 1909, which was only a few days before the expiration of the contract time for furnishing all the shooks contracted for. We think there was sufficient evidence of damage occurring before this time, arising by failure to furnish shooks under the contract, to support the finding of the jury as to the amount of damages awarded respondent.

It is contended that appellant's motion for judgment notwithstanding the verdict should have been granted because respondent had not filed with appellant orders for one-half or more of the entire amount of shooks contracted for, before January 20, 1909, as the contract seems to contemplate. It is plain from the evidence that up to January 20th respondent had already filed more orders than appellant had filled, and that appellant was then behind in fulfilling its obligation under the contract. It is also plain that the parties proceeded thereafter under the contract without either declining to perform for this reason. Other errors are assigned, but they are presented to us practically without argument or citation of authorities. We think it sufficient to say they are without merit.

We find no prejudicial error in the record, and therefore affirm the judgment.

DUNBAR, C. J., MOUNT, FULLERTON, and GOSE, JJ., concur.

[No. 9330. Department Two. March 11, 1911.]

Martin Holm, *Appellant*, v. William T. Montgomery, *Respondent*.[1]

Highways—Rights of Abutter—Trespass—Injunction—Waters and Water Courses. Since the fee of public highways rests in the abutting owner, he may maintain irrigating ditches in the untraveled portion thereof; and his rights will be protected by an injunction against one trespassing thereon by diverting the water by a continuing act resulting in special damage.

Appeal from a judgment of the superior court for Kittitas county, Kauffman, J., entered July 5, 1910, upon sustaining a demurrer to the complaint, dismissing an action to enjoin a trespass upon a public highway. Reversed.

Hovey & Hale, for appellant.

Pruyn, Streff & Hoeffler, for respondent.

Morris, J.—Appeal from a judgment dismissing action upon appellant's refusal to plead further to an order sustaining a general demurrer to his complaint. The complaint set forth that appellant was the owner of certain described real property in Kittitas county, and that Hans Hansen was the owner of other described land, separated from appellant's land by a county road sixty feet in width, the traveled portion of the road being in the center thereof, leaving a strip on each side not necessary for road purposes; that appellant required water for the proper cultivation of his lands, which he obtained from ditches and lands north of his land, some of which he conveyed to his land along the county road, outside of its traveled portion, part of which water was waste water from the Hansen land, which appellant had obtained permission to use, and Hansen had given his consent to the use of the road for the conveyance of this water to appellant's land; that respondent, without authority from

[1]Reported in 113 Pac. 1116.

any source, had made excavations in the untraveled roadway, and destroyed the dams and culverts constructed by appellant, thereby causing the water to flow away from appellant's land, including the water obtained by appellant from Hansen, and had caused the water to flow to his own lands, and was continuing to do so; that the loss of this water was causing appellant irreparable damage, as without it he could not successfully cultivate his lands. An injunction was prayed for, to restrain respondent from these acts, and from interference with appellant's dams and ditches along the highway.

The theory of the ruling, as we gather it from the briefs, was that appellant had not shown any special damage, nor any license from the county commissioners to run the water along the road; that the complaint showed but a single past act, and appellant himself being a wrongdoer could not invoke the aid of the courts to prevent the acts of respondent.

It has become the settled rule of this court that the public has only an easement of use in a public street or highway, and that the fee rests in the abutting owner. *Simons v. Wilson*, 61 Wash. 574, 112 Pac. 653. Where this rule obtains, it is as well settled that the owner of the abutting property may make such use of the land within the highway as will not interfere with its use for public travel, and that it is a trespass against the owner of abutting property to make excavations in the highway, or otherwise disturb its use as a public highway. 15 Am. & Eng. Ency. Law (2d ed.), 416. The use which the abutting owner may make of the highway includes the right to maintain ditches or drains for the benefit of his lands; providing he maintains no nuisance in so doing, nor interferes with the use as a highway. *Groton v. Haines*, 36 N. H. 388; *Woodring v. Forks Township*, 28 Pa. St. 355, 70 Am. Dec. 134; *Nelson v. Fehd*, 203 Ill. 120, 67 N. E. 828; *Dexter v. Riverside & Oswego Mills*, 15 N. Y. Supp. 374; *Thom v. Dodge County*, 64 Neb. 845, 90 N. W. 763.

The appellant was clearly within his rights in using the highway outside of its traveled portion, and in such a way as not to interfere with the public use. The respondent, in interfering with or destroying such use, was a trespasser. The continued interference would be a continuing trespass, to be restrained by the order of the court when it is shown as alleged that irreparable damage would follow. The allegations of the complaint show the act complained of to be a continuing act resulting in special damage to appellant.

The complaint was good as against a general demurrer. The judgment is for that reason reversed, and the cause remanded with instructions to overrule the demurrer, and for further proceedings.

DUNBAR, C. J., CHADWICK, and CROW, JJ., concur.

[No. 9126. Department Two. March 13, 1911.]

AARON ANDERSON, *Respondent*, v. W. S. OSBORN, *as Administrator de bonis non of the Estate of Anna O. Miller, Deceased, and* STATE OF WASHINGTON, *Intervener, Appellants.*[1]

APPEAL—PARTIES—DISMISSAL. The appeal of an intervener cannot be dismissed on the ground that it is not a necessary or proper party, where it was brought in below as a necessary party defendant, and no exception or appeal was taken from the order bringing it in.

WORK AND LABOR—GRATUITOUS SERVICES—PRESUMPTION—EVIDENCE. Where the deceased went to live with the plaintiff, taking the place of his sister as housekeeper, the presumption that mutual services rendered are a gratuity must be overcome by clear and convincing evidence of the initiatory contractual relation; and there is not sufficient evidence to submit the issue to the jury where it appears that the parties had lived together, rendering mutual services for thirty years, without any claim or recognition of indebtedness during the entire period; and statements to third persons, ten and fifteen years after the relation commenced, that deceased "would

[1]Reported in 114 Pac. 160.

pay him well" and had left all property to him, do not amount to a recognition of indebtedness.

Appeal—Review—Verdicts. Where there is no evidence to sustain the verdict, it will be set aside on appeal.

Appeal from a judgment of the superior court for King county, Grimshaw, J., entered May 26, 1910, upon the verdict of a jury rendered in favor of the plaintiff, in an action on an implied contract. Reversed.

Louis Nockels, for appellant.

T. D. Rockwell, *J. E. Frost*, and *S. H. Chase*, for intervener.

Bo Sweeney and *Corwin A. Townsend*, for respondent.

Morris, J.—Respondent brought this action to recover for services rendered in the support, care, and maintenance of the deceased, for a period of thirty years preceding her death. The administrator *de bonis non* denied any liability in his answer, and the state, upon its petition, was permitted to intervene and file answer denying any liability upon the part of the estate. The issue was submitted to a jury, and verdict returned awarding respondent $5,500. Judgment being entered, the administrator and the state appeal.

Respondent moves to dismiss the appeal of the state, upon the ground that it is not a necessary or proper party, and that its intervention is without authority of law. This motion must be denied. The state was made a party by the order of the court below, and upon the entry of such order became a proper party in the action. No appeal having been taken by respondent from the entry of such order, the state is a proper party upon the appeal, and its appeal cannot be dismissed except for irregularity or jurisdictional matter subsequent to the judgment. Whoever is a necessary and proper party in the court below is a necessary and proper party upon the appeal, and upon the appeal no review of the order making additional parties can be had, except upon a proper exception and appeal from such order.

The error urged by appellants is the failure of the court below to grant a nonsuit and, at the close of the evidence, to instruct the jury to render a verdict in their behalf; both of which motions raise the same question and will be discussed together. It appears from the record that Anna O. Miller first became acquainted with respondent in 1878, at which time, upon the death of a sister who had been his housekeeper—he being a bachelor—she went to his home and continued to reside with him until her death in 1908, except for a short period when she was an inmate of the insane asylum. The theory of the action was that, during the time she lived with respondent, she was dependent upon him for support; that for the greater portion of that time she was an invalid requiring his constant care and attention. As might be expected, the evidence is conflicting, witnesses for respondent testifying to his care of Mrs. Miller, his payment of bills for household expenses and other services, while those for appellants show she was a hard-working woman, doing all the work of the household, attending to the garden, the cow, and the chickens, and in addition, for a portion of the time, acting as janitor in the Sullivan building. It is also shown that she accumulated some money from her outside service, which she invested in land and mortgages. Others testify that she paid for groceries and household supplies delivered at the home. Such a contradiction of facts is properly submitted to a jury, and the verdict should not be disturbed, providing we can find the necessary initiatory relation or contract to support the action.

The court below instructed the jury that, before they could find for respondent, they must find that, from the time Anna O. Miller came to live at his home, she intended to pay for her support and maintenance, and that the intention to charge and the intention to pay for such support and maintenance must have been in the minds of both parties. Such is unquestionably the law. When such a relation as we here find is assumed, there can be no recovery by either party un-

less there be a contract to charge for the services rendered by the one party, or a contract to pay for the support furnished by the other party. Otherwise it will be presumed that the relation was one of mutual benefit, and both the service and the support a gratuity. 18 Cyc. 410; *Butcher v. Geissenhainer*, 109 N. Y. Supp. 159. Not only must a contract be established, but the relation of the parties must have had its initiation in such a contract, when it is sought, as here, to support the cause of action upon the original relation.

"All contracts must be good or bad in their original creation, and must not depend on subsequent contingencies; that is, whether the party chose to make it a gift, or a charge at a future day or not. That it will never permit a friendly act, or such as was intended to be an act of kindness or benevolence, to be afterward converted into a pecuniary demand." *James v. O'Driscoll*, 2 Bay (Mo.) 101, 1 Am. Dec. 682.

The amount to be paid need not have been agreed upon, since the law can, by implication, supply a promise to pay, when it finds an agreement for the rendition of services. But the implied promise to pay must be based upon the agreement for service and not upon the performance of service, where, as here, there is shown to have been a mutual service. *Potter v. Carpenter*, 76 N. Y. 157.

There is a strong presumption in the law that in these cases such mutual service was intended as a gratuity, and such presumption cannot be overcome except by clear and convincing evidence. Carefully examining this record, we can find nothing that hints or points to any contract on the part of Mrs. Miller to pay for her support, nor any intention on the part of respondent to charge for such support. Mrs. Miller was without a home. Respondent had just lost his sister, who had been his housekeeper. It would have been of mutual benefit for Mrs. Miller to take the sister's place. That she was capable of rendering service is established by her accumulations of property from the earnings of such

service. That she rendered service to respondent and was not indebted to him at the time of her death is apparent from the fact that there is no showing of any claim or recognition of indebtedness during the entire period of thirty years that these two people lived together. The law looks with disfavor upon a claim made upon an estate under such circumstances, and will permit no recovery unless there is some evidence to establish the initiatory contractual relation. The best that can be said of respondent's evidence in this connection is that subsequently to 1889, the date not being given—but as the witness did not know Mrs. Miller until 1889, it must have been subsequent to that time—Mrs. Miller in speaking of respondent to the witness, "said she would pay him well for what he done." Again, in 1893, fifteen years after they first assumed their relation, Mrs. Miller told another relative of respondent "What she had was left to him." Neither of these assertions could be magnified into a recognition of an understanding on the part of Mrs. Miller that she was indebted to respondent for her support since 1878.

"A claim against a decedent's estate should be supported by stronger evidence than admissions to third persons." *In re Weaver's Estate*, 182 Pa. St. 349, 38 Atl. 12.

Respondent strongly urges that, inasmuch as the facts were submitted to a jury, we should not disturb their verdict. Such is our rule as to facts properly submitted to a jury, and if there was any evidence from which the jury could have followed the instructions of the court and found that an intention to charge and an intention to pay for services rendered was present in the minds of respondent and Mrs. Miller when she first went to his home, we would permit the verdict to remain as a finding upon a contested question of fact. But where there was no evidence of such fact, the jury should not have been left to infer it, or to supply it from the evidence of the relation of these two persons, extending over a period of thirty years, without a single act

upon the part of either that would tend to establish such a contract. In *Butcher v. Geissenhainer, supra,* an action similar to this and where the evidence was much stronger in support of the claim, the court said:

"It may be granted that there was some evidence tending to establish the contract, and in an ordinary case enough to go to a jury. But the court of appeals has established the rule in this class of cases, the testimony must be not only clear and convincing, but of the clearest and most convincing character, and given or corroborated in all substantial particulars by disinterested witnesses, and it must follow that in order to take such a case to a jury more is required than will ordinarily suffice. Of course, no precise rule can be laid down for determining when such a question becomes one of fact, but the court must determine in the first instance whether the testimony is of the required character. . . . While it is true that a claim against a decedent's estate is as meritorious as any, a different rule of proof is required in cases which are justly the object of suspicion, easily fabricated, and with difficulty disproved. The plaintiff's case is burdened from the start with suspicion, and it must be considered by the court in determining whether there is a case for the jury. While it is true that it is the province of the jury to weigh the testimony, preliminary to that the court must determine as matter of law whether the rule of proof required has been complied with."

This is a strong statement of the rule, and we do not have to go as far in holding that respondent had made no sufficient proof to take his case to the jury. The case is cited as showing the tendency of the courts to deny a recovery in these cases, unless there is reliable and convincing proof upon which to base it. Appellants' motion for instructed verdict should have been granted.

The judgment is reversed, and the cause remanded with instructions to dismiss.

Dunbar, C. J., Chadwick, and Crow, JJ., concur.

[No. 9038. Department Two. March 13, 1911.]

H. M. GOULD *et al.*, *Respondents*, v. ASA E. WHITE *et al.*, *Appellants.*[1]

APPEAL—DECISION—REMAND—PROCEEDINGS BELOW. Upon reversing and remanding a case with instruction to determine the rights of the parties under the betterment act, a supplemental answer setting up the bar of a judgment in favor of third parties is demurrable; as the decision on appeal is conclusive.

SAME. Upon remanding a case, because of insufficiency of the evidence to fix the value of property, additional evidence of the value is properly taken.

TAXATION—FORECLOSURE—VACATION—INTEREST. Upon setting aside a void tax foreclosure, six per cent interest is properly allowed upon taxes paid, since the statutory penalty of 15 per cent runs only from the time the certificate is taken out until the taxes are paid, whether voluntarily or by foreclosure.

TAXATION—FORECLOSURE—VACATION—RECOVERY OF POSSESSION—JUDGMENT—FORM. Under § 3 of the betterment statute for the protection of occupants of land who had made improvements or paid taxes, the plaintiff should be given a provisional judgment granting the statutory options, title and immediate possession to be secured by final judgment in favor of the party entitled to receive it, at the expiration of the time limited.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered May 2, 1910, in favor of the plaintiff, in an action to set aside tax judgments, after a trial before the court without a jury. Modified.

O. L. Willett, for appellants.

Sullivan & Stevens, for respondents.

CHADWICK, J.—This case has been before the court (54 Wash. 394, 103 Pac. 460), and was sent back with instructions to enter a decree establishing the rights of the parties pursuant to the provisions of the statute of 1903, Laws 1903, page 262, known as the betterment act (Rem. & Bal. Code, § 797 *et seq.*). This court fixed the value of the improve-

[1]Reported in 114 Pac. 159.

ments at $250. Because of the uncertain character of the testimony, the value of the property itself was not fixed. The case was remanded with instructions to the lower court to find this figure, as well as the amount of taxes, etc., paid by the appellants. When the case came on for hearing in the lower court, appellants sought to show, by a supplementary answer, that respondent had, while this action was pending, brought a possessory action against the tenants of these appellants, who were then in possession; that such action was dismissed for want of prosecution, and with prejudice; and that the judgment rendered therein is a bar to further proceedings herein. The court sustained a demurrer to the supplemental answer, and this is the first error assigned.

We think the order of the lower court was proper. Its duty was enjoined by the judgment of this court, and the right of possession in a third party who was not a party to the action could in no way affect the right of respondents as against appellants.

It is also insisted that the value of the lot should have been determined under the evidence taken at the former trial, and the statement of facts on that trial was offered as evidence and rejected by the court. As we have said, it was because the evidence at the former trial was unsatisfactory that we remanded the case for further hearing under the betterment act. Had we been satisfied to enter a judgment fixing the value of the lot upon that evidence, we would have done so. The court proceeded to take additional evidence, which was objected to by appellants. The evidence was properly received, and the finding of the court is conclusive. In passing it may be said that the value fixed by the court, $2,000, is the same amount alleged to be the value of the lot by appellants in their answer to the original complaint.

The court allowed interest at the rate of six per cent per annum on taxes paid. It is contended that, inasmuch as fifteen per cent is allowed on redemption certificates, and that the judgment of foreclosure, the validity of which was

the bone of contention in the former appeal, was held to be void, they are still in effect and vital to carry the increased rate of interest. The penalty rate of interest is statutory, and runs only from the time the certificate is taken out until the taxes are paid, whether voluntarily or upon foreclosure. *Wheeler Co. v. Pates*, 43 Wash. 247, 86 Pac. 625; *Childs v. Smith*, 51 Wash. 457, 99 Pac. 304, 130 Am. St. 1107. This allowance is made to induce the payment of taxes, and does not, and in our judgment could not, fix the contract rights of parties beyond its terms. We find no error in this regard.

The lower court adjudged that respondents were entitled to the immediate possession of the premises, notwithstanding the original proceeding was, as it has been held by this court, a direct attack upon the judgment in the tax foreclosure proceedings, and the question of possession would be in no way involved. Section 3 (Id., 799), seems to contemplate a determination of the legal right of possession, but is obscure as to the time when the possession shall begin. We think the judgment of the lower court should be modified in the respect complained of, and that in this and all like cases a provisional judgment should be entered, granting the statutory options, and upon the expiration of the time fixed in the statute, a final judgment should be entered vesting title and an immediate right of possession in the party entitled to receive it. The cause will be remanded with instructions to modify the judgment in this regard.

DUNBAR, C. J., and CROW, J., concur.

MORRIS, J., took no part.

[No. 9098. *En Banc.* March 13, 1911.]

METROPOLITAN BUILDING COMPANY, *Respondent*, v. KING COUNTY *et al.*, *Appellants*.[1]

TAXATION—ASSESSMENT—LEASEHOLDS. Under Rem. & Bal. Code, § 9094, requiring the assessment of leaseholds as personal property, the tax value of a fifty year lease from the state, the lessee's buildings reverting at the end of the term, is the actual value of the term less rent reserved, to be determined by the present worth from year to year, considering also the term.

TAXATION—ASSESSMENT—VALIDITY—VACATION. The assessment of a leasehold, fixed by the value of the lessee's improvements, having no basis in law, will be set aside, notwithstanding it could not be reviewed for mere overvaluation.

Appeal from a judgment of the superior court for King county, Robert H. Lindsay, Esq., judge *pro tempore*, entered June 10, 1910, in favor of the plaintiff, reducing an assessed valuation on real property, after a hearing on the merits before the court. Affirmed.

George F. Vanderveer, *Harold Preston*, and *S. H. Chase*, for appellants.

Douglas, Lane & Douglas and *Kerr & McCord*, for respondent.

CHADWICK, J.—This case will require but a meager statement of the facts, the question for our determination being one of law only. Respondent is the owner of a lease on the old university campus in the city of Seattle. The tract, originally compact, has been intersected by streets and laid out in city lots, it being the intention of respondent to finally cover the tract with permanent structures. The aggregate rentals to be paid the university during the term of the lease, which is fifty years, will amount to the sum of $3,914,000, and the buildings erected or to be erected become at once the property of the university, or state property. It is further

[1]Reported in 113 Pac. 1114.

conditioned that the lease is dependent upon the full compliance of the respondent with all its terms and conditions, and the prompt payment of the rent reserved. The plan of the respondent is to issue bonds and erect business blocks. In 1909, it had borrowed and put into the property approximately $1,000,000. Other property being assessed in King county at forty-eight per cent of its value, the assessor returned an assessed value against the property of the respondent in the sum of $480,000. This was approved by the board of equalization. It is shown that so far the investment has not been profitable.

The only question is, what is the proper basis for valuation. It is the contention of the appellants that the value of the property should be measured by the investment and the duration of the term; whereas the respondent contends that the proper basis is the actual value in money of the leasehold interest. Const., art. 7, § 2. It has been heretofore held that a leasehold should be taxed as real property. *Moeller v. Gormley*, 44 Wash. 465, 87 Pac. 507. But the legislature has since provided otherwise.

"For the purposes of assessment and taxation all leases of real property and leasehold interests therein for a term less than the life of the holder, shall be and the same are hereby declared to be personal property." Laws 1907, p. 206, § 1 (Rem. & Bal. Code, § 9094).

We are bound by the statute, therefore, to determine the value of the leasehold as personal property. In determining the worth of a leasehold the courts have universally held that it is the value of the term less the rent reserved. The value of the term is fixed with reference to present as well as prospective conditions; not speculative, but actual; or, to state the proposition more aptly, its value in money to one who desires to sell but who is under no necessity for selling, and to one who is desirous of buying but is under no compulsion to do so.

We do not find many cases involving the tax value of a

lease. In *People ex rel. Metropolitan Street R. Co. v. Barker*, 121 App. Div. 661, 106 N. Y. Supp. 336, it was sought to assess property leased by the company. It was there said:

"The actual value of the leases was to be ascertained as is the actual value of other property when required to be ascertained in a judicial proceeding. It could not be assumed that property of this character, which necessarily depends upon the amount that can be realized from it and the amount of rental which the lessee company is bound to pay, was of any definite value, and the usual method in ascertaining the value of such property is the evidence of those who are familiar with the value of similar property and can testify as to its value. Whether these leaseholds had an actual value to the lessee company or not was a question which had to be determined from the evidence. . . ."

See, also, *People ex rel. Delaware & H. Canal Co. v. Feitner*, 61 App. Div. 129, 70 N. Y. Supp. 500; *Id.* 171 N. Y. 641, 63 N. E. 786.

This rule of value has been applied in condemnation cases, where it is necessary to determine the immediate value of leasehold property as a basis for the assessment of damages. *Corrigan v. Chicago*, 144 Ill. 537, 33 N. E. 746, 21 L. R. A. 212; *In re New York & Brooklyn Bridge*, 4 N. Y. Supp. 222; *Pennsylvania R. Co. v. Eby*, 107 Pa. St. 166. If the real property upon which the buildings are erected were owned by a private individual, we apprehend that the question raised in this case would not have occurred; for, unless controlled by the contract of the parties, the real property would be assessed to the owner of the fee, while the leasehold would be assessed to the lessee. The fact that the fee is in the people of the state of Washington does not alter the rule.

The fallacy of appellants' position may be readily shown by suggesting that, in the final years of the term, if their theory be followed, respondent would pay only a nominal tax, or be burdened by a tax so onerous as to amount to confiscation. For if the assessment be made with reference

to the time the lease had yet to run, the assessed value would be out of all proportion to its value. If, on the other hand, respondent were compelled to pay upon the amount of its investment, the tax would be grossly excessive. Whereas, under the rule as we find it to be, the present worth of the lease from year to year, considering also the term, fixes a criterion of value easily ascertainable and just to both parties. Therefore, an assessment based upon the value of the improvements or the amount invested therein was erroneous, and entitles respondent to relief.

But it is here asserted, upon the authority of *Olympia Water Works v. Gelbach*, 16 Wash. 482, 48 Pac. 251; *Edison Elec. Illuminating Co. v. Spokane County*, 22 Wash. 168, 60 Pac. 132; *Templeton v. Pierce County*, 25 Wash. 377, 65 Pac. 553; *Northern Pac. R. Co. v. Pierce County*, 55 Wash. 108, 104 Pac. 178; and *Doty Lumber & Shingle Co. v. Lewis County*, 60 Wash. 428, 111 Pac. 562, that we cannot review the act of the board of equalization. The rule of these cases is that an assessment will not be set aside for mere overvaluation, unless the property is so grossly overvalued as to result in a fraud upon the property owner; but where there is no basis in law for the assessment, courts have always stood ready to correct the wrong. It is fundamental that the power to tax can only be exercised under a statute defining its limitations; and if the law be not followed, the owner is not to be left without remedy. The record discloses a state of facts which, in our judgment, sustains the trial judge in his conclusion; and finding no error in the record, the judgment is affirmed.

DUNBAR, C. J., GOSE, FULLERTON, MORRIS, CROW, PARKER, and MOUNT, JJ., concur.

[No. 9185. Department One. March 13, 1911.]

E. H. NADEN, *Respondent* v. CLARENCE J. CHRISTOPHER *et al.*, *Appellants.*[1]

APPEAL—REVIEW—FINDINGS. Findings upon conflicting evidence, fully supported, will not be disturbed on appeal.

EVIDENCE—PAROL TO VARY WRITING—FRAUD. Where a clause in a warranty deed gave the grantee the right to collect all rents due under a certain lease, parol evidence is admissible, as between the original parties, to show that it was inserted on the express stipulation that it should not be treated as a warranty; not to vary the terms of the deed, but to prevent its fraudulent use.

MORTGAGES—FORECLOSURE—AMOUNTS—MATURITY—PLEADING—SUPPLEMENTAL COMPLAINT. Upon the foreclosure of mortgage notes, part of which were not due, judgment may be entered for the amount due at the date of the entry of the decree, without the filing of any supplemental complaint as to an installment falling due since the action was commenced, where the foundation of the judgment was laid in the complaint and the notes were introduced in evidence.

MORTGAGES—FORECLOSURE—AMOUNTS MATURING—APPLICATION OF PROCEEDS. Upon the foreclosure of mortgage notes, part of which were not due, Rem. & Bal. Code, § 1128, authorizes the application of the proceeds of the sale, where the land cannot be sold in parcels, first to the sum due and costs, and the next to the residue not due but secured by the mortgage.

SAME—DECREE—SALE IN PARCELS. In such case, application to ascertain if the property can be sold in parcels follows the judgment, under Rem. & Bal. Code, § 1127.

STATUTES—TITLES AND SUBJECT. An act "to regulate the practice and proceedings in civil actions" embraces but one object, within organic act, § 6.

Appeal from a judgment of the superior court for Whatcom county, Kellogg, J., entered March 9, 1910, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to foreclose a mortgage. Affirmed.

Craven & Greene, for appellants.

Hadley, Hadley & Abbott, for respondent.

[1]Reported in 113 Pac. 1116.

Gose, J.—On and prior to the 15th day of January, 1909, the plaintiff, a resident of the town of Kent, in King county, was the owner of an improved tract of property in the city of Bellingham, in Whatcom county. The defendants were residents of Bellingham. One Wyatt, a real estate man in Bellingham, at the instance of the defendants, induced the real estate firm of Brisbin, Smith & Livesey, also of Bellingham, to wire the plaintiff an offer for the property of $12,500, $3,500 cash and the remainder on terms. On the following day the plaintiff answered by wire an acceptance, as follows: "Taken at once, yes. Obtain deposit before sending for me." Thereafter, and on January 6, the plaintiff and the defendants entered into a contract in writing, whereby the former agreed to sell, and the latter agreed to buy, the property for $12,500, $3,500 to be paid in money, the balance to be paid at the rate of $1,500 per year, with interest at the rate of seven per cent per annum, and secured by a mortgage on the property. The contract recited that the defendants had deposited $500 with Brisbin, Smith & Livesey, "to be forfeited to the use and benefit of the seller if the buyer refuses to perform this contract in full," and that "the seller undertakes to convey to the buyer the fee simple title to said property subject to the following incumbrances: None; and to furnish an abstract showing title accordingly." The firm of Brisbin, Smith & Livesey signed the contract for the plaintiff. The plaintiff went to Bellingham on January 15 following, met defendants, and executed and delivered a warranty deed, which contained the following clause:

"Together with the right to receive and collect all rents now due or heareafter to become due under that certain lease to said premises, originally executed to Gus Larson, and filed for record January 24th, 1906, and recorded in Vol. 13 of Powers of Attorney, at page 178 thereof, Records of Whatcom County, Washington."

Upon the delivery of the deed the defendants paid to the

plaintiff the sum of $3,500, and executed six interest-bearing notes for the sum of $1,500 each, maturing respectively in one, two, three, four, five, and six years from their date, and secured by a mortgage on the property. In January, 1906, the plaintiff executed to one Gus Larson a lease upon the property for a term of five years and until January, 1911, at the monthly rental of $100 per month for the first three years, and $125 per month thereafter. The lease was assigned to the Pacific Brewing & Malting Company prior to July, 1908, and it was occupying the property when the deed was executed. Prior to July, 1908, it had paid a rental of $100 per month. On June 9, 1908, in answer to the demand of the brewing company for a reduction in the rent, the plaintiff wrote it a letter, stating that he would take $50 per month "until times are better." On the 14th day of August, 1909, the plaintiff filed a bill for the foreclosure of the mortgage, alleging, among other things, that the first semi-annual installment of interest had not been paid. Issue was joined upon the averments in the complaint and the new matter pleaded in the answer, and at the conclusion of the testimony, a decree was entered in favor of the plaintiff, directing a foreclosure of the mortgage and a sale of the mortgaged premises. The defendants have appealed.

The appellants contend that, at the time of the execution and delivery of the deed, the respondent represented to them that the brewing company was paying a monthly rental of $100 per month, and that he failed to disclose to them that he had written the letter consenting to a reduction of the rent to $50 per month. The respondent stoutly denies this contention, and asserts that at that time he informed them that the rent was $50 per month, and that the lease was broken. The parties agree that the respondent stated that the terms of the lease had been broken. These contentions are made an issue in the pleadings and are covered by the evidence. Relying upon their view of the transaction, the

appellants, on the date of the maturity of the interest, tendered $190, and claimed an offset in damages for the balance in the loss of rental.

The court found that the respondent, prior to the execution of the deed, informed the appellants that the brewing company was occupying the premises under a lease from month to month at a monthly rental of $50 per month; that the original lease was broken, and that the rent clause in the deed which has been set forth was inserted at the request of the appellants, and upon the express agreement that it would not be treated as a warranty or as being obligatory upon the respondent in any manner, but that it would be used only for the purpose of enforcing any rights to back rent which the respondent had theretofore possessed under the lease. There is abundant competent evidence to support the finding. It is true that the evidence is conflicting, but a reading of the record has not convinced us that the court reached an erroneous conclusion upon the facts. It must be conceded that the judge who saw the witnesses in action had a much better opportunity of getting the truth than this court has from reading the cold letter of the record. Moreover, the respondent's view of the transaction is corroborated by the contract anterior to the deed, which provides for the conveyance of a fee simple title free from incumbrance, and which does not mention the lease. The clause was penned by the appellants' attorney.

The appellants next insist that the rental clause in the deed is a warranty and that its terms cannot be varied by parol. The conclusion we have reached upon the facts and the law makes it unnecessary to determine whether the clause is a warranty. The finding to which we have referred was responsive to the new matter set forth in both the answer and the reply, and the evidence received upon that issue. The prayer of the reply is that, if, in the judgment of the court, the clause in the deed is at variance with

the new matter pleaded, the deed be reformed to speak the truth. The respondent contends that it would be a fraud upon him to enforce the clause as a warranty when it was inserted in the deed upon the express stipulation that it should not be treated as creating any liability against him. We think this view harmonizes with sound equitable principles. In *Young v. Stampfler*, 27 Wash. 350, 67 Pac. 721, the defendant was induced to execute a warranty deed in lieu of a quitclaim deed, upon the representation of the husband of the grantee that such a deed would better enable them to dispose of the property, and that the warranty clause would not be enforced. There, as here, the suit was between the original parties to the transaction, with no rights of third parties intervening. In meeting the contention that that fact could not be shown by parol evidence, the court said:

"The rule is that parol or oral evidence is incompetent to contradict a covenant in a deed, and upon the delivery and acceptance of a deed all prior or contemporaneous agreements are merged in the deed or writing, and cannot afterwards be set up to contradict or vary the same. The plaintiff insists that under this well known rule the defense pleaded is insufficient. Under our system equitable relief is given in actions at law. The evidence to support the affirmative defense of the defendants was not introduced to control or vary the covenant in the deed, but to prevent the enforcement of the same, because it was obtained in such a manner that it would a fraud upon the covenantors to allow the enforcement of the covenants. In such a case oral evidence is admissible. The rule is thus laid down by Wharton: 'But the interposition of fraud, actual or constructive, makes such proof legitimate. If it be adequately established that a party was induced to sign a contract by fraudulent parol representations that the contract was only to be contingently operative, then, upon such party himself doing equity, he will be protected from the enforcement of such contract. And the relief that would be given in this respect by a chan-

cellor will be given by a common law court administering equitable remedies.' 2 Wharton, Evidence (3d ed.), § 929." See, also, 2 Herman, Estoppel, 762; *Murray v. Dake*, 46 Cal. 644; *Isenhoot v. Chamberlain*, 59 Cal. 630; 17 Cyc. 693. As was said in the *Murray* case:

" 'It is as much a fraud to obtain a paper for one purpose and use it for a different and unfair purpose, as to obtain it by fraudulent statements.' "

The evidence was admissible to prevent the fraudulent use of the clause in the deed. The attempt to make a fraudulent use of a document is as obnoxious to the principles of equity as fraud in its procurement.

There is no clause in the mortgage maturing the principal not due for the failure to pay any interest or principal at maturity. The provision is that, if "default shall be made in the payment of the said sum or the interest thereon, or any part thereof, at the time the same shall become due, then the said party of the second part [the respondent] may foreclose this mortgage as provided by law." The trial of the cause began on January 4, 1910, and was concluded on the following day. At that time there was nothing due upon the mortgage indebtedness according to its terms, except the first semi-annual installment of interest, amounting to $315, with interest on that sum from July 15, 1909, at the legal rate. The decree was entered on the 9th day of March, 1910. At that time a second installment of interest and the first principal note had matured. The notes and mortgage were set forth *in haec verba* in the bill. It was also alleged:

"That there is now due to plaintiff on said notes and mortgage, interest payable July 15th, 1909, in the sum of three hundred fifteen dollars ($315) with interest thereon at the legal rate until paid; together with the sum of nine thousand dollars ($9,000) with interest from and after the 15th day of July, 1909, at the rate of seven per cent (7%) per annum until paid."

A judgment was entered for the amount of the first principal note and for the first two installments of interest. The decree further provides that, following its entry, the court would entertain an application to ascertain whether the mortgaged property could be sold in parcels without injury to the interests of the parties, and that, if it was determined that it could not be sold in parcels, the court would order the whole of the premises sold and the proceeds applied, (1) to the payment of the amount due with interest, attorney's fees and costs, and (2) to the payment of the aggregate of the five notes not due, with interest as provided in the notes, from the 15th day of January, 1910, the surplus, if any, to be paid to the appellants. The notes were admitted in evidence. The respondent did not file a supplemental complaint, nor did the appellants plead payment in any way, except an offset in damages for a breach of the clause in the deed, which we have heretofore quoted. The appellants contend that, without the filing of a supplemental complaint, the court had no power to enter any judgment in excess of the amount due when the bill was filed. As we have seen, the foundation for the judgment was laid in the complaint. It was therefore proper to include in the decree the portion of the mortgage debt that matured after the commencement of the action and before its rendition. 9 Ency. Plead. & Prac. pp. 427-8. The clause in the decree for the application of the proceeds of the sale of the premises to the payment of the notes not due is in harmony with the provisions of Rem. & Bal. Code, § 1128, which is as follows:

"If the mortgaged premises cannot be sold in parcels, the court shall order the whole to be sold, and the proceeds of the sale shall be applied first to the payment of the principal due, interest, and costs, and then to the residue secured by the mortgage and not due; and if the residue do not bear interest, a deduction shall be made therefrom by discounting the legal interest; and in all cases where the proceeds of the sale shall be more than sufficient to pay the

amount due and costs, the surplus shall be paid to the mortgage debtor, his heirs and assigns."

The application to ascertain whether the property can be sold in parcels follows the final judgment. Rem. & Bal. Code, § 1127.

It is finally suggested that Rem. & Bal. Code, §§ 1126, 1127, and 1128, Laws of 1854, p. 208, are invalid. The title of the original act is: "An act to regulate the practice and proceedings in civil actions." It is said that these sections are in conflict with provisions of § 6 of the organic act of the territory, which provides that "Every law shall embrace but one object and that shall be expressed in the title." It is suggested, by way of argument, that the word "object" is more restrictive than the word "subject." Without further discussion, we think this contention is without merit.

The decree is affirmed.

DUNBAR, C. J., FULLERTON, MOUNT, and PARKER, JJ., concur.

[No. 9143. Department One. March 13, 1911.]

LILLY CALDWELL, *Respondent* v. NORTHERN PACIFIC RAILWAY COMPANY, *Appellant*.[1]

CARRIERS—PASSENGERS—ACTIONS—INSTRUCTIONS. In an action by a passenger against a railroad company for breach of its contract of carriage, it is proper to instruct the jury as to the duty of the carrier to furnish seats, where the plaintiff contended that she was compelled to sit on the floor of a car for want of suitable seats.

APPEAL—REVIEW—HARMLESS ERROR—INSTRUCTIONS. In an action against a carrier a specific instruction is not objectionable as failing to point out the distinction between unintentional and wanton wrong, where by another instruction the jury were told that to recover more than nominal damages wanton or wilful disregard of plaintiff's rights must be shown.

[1]Reported in 113 Pac. 1099.

APPEAL — REVIEW — VERDICTS — EXCESSIVENESS — SUCCESSIVE VERDICTS — DAMAGES. Although a verdict for $1,000 for insults to a passenger was set aside as excessive, a second verdict for $1,200, on much the same evidence, will not be set aside for excessiveness, where it is not probable that a third trial would result differently.

Appeal from a judgment of the superior court for Clarke county, McMaster, J., entered April 20, 1910, upon the verdict of a jury rendered in favor of a passenger for damages by reason of insults by the conductor. Affirmed.

A. L. Miller and *Geo. T. Reid*, for appellant.

Frank E. Vaughan, for respondent.

FULLERTON, J.—This cause was before this court on a former appeal, and will be found reported in 56 Wash. 223, 105 Pac. 625, where will be found also a full statement of the facts giving rise to the controversy. By reference to the opinion on the former hearing, it will be observed that the jury at the first trial awarded the plaintiff for her injuries the sum of $1,000, and that this court thought the verdict so far disproportionate to the actual injury sustained as to require the submission of the question to another jury, and reversed and remanded the case solely for that reason. At the second trial the jury returned a verdict for $1,200, and this appeal is from the judgment entered thereon.

The appellant assigns error upon the instructions of the court to the jury. It is urged against the first instruction that the court therein undertook to define the duties of railway companies towards its passengers with reference to furnishing them with suitable seats, when, as it contends, the question was not involved in any of the issues of the case. But we think a reference to the statement of the case made at the former hearing will make it appear that this question was directly in issue. One of the principal contentions of the plaintiff was that she was compelled to sit on the floor of the car in which she was carried for want of suitable seats therein. It was proper, therefore, to instruct the jury as to

the duties of the defendant with regard to furnishing suitable seats for its passengers.

It is complained of the remaining instructions that they fail to draw the distinction between unintentional wrong and wanton and wilful wrong. But while this criticism may be just as applied to the particular parts of the instruction pointed out, it seems to us that it is not warranted when applied to the instruction as a whole. For example, the court gave this instruction:

"You are instructed that a party is entitled to recover for the actual measurable wrongs sustained, and in addition thereto such damages as result from injury to the feelings, or as it has been put, compensation for mental suffering; but there must be some ground upon which to base this element. Damages do not flow from the mere declaration of the party that he has suffered in feeling. There must be some evidence or circumstances showing some reason for the mental attitude of the person who alleges the wrong; so that in order to justify a recovery on this account for more than nominal damages, the wrong must be attended by circumstances showing wanton or wilful disregard of the rights of the passenger."

We think it must have been understood by the jury that this was intended to qualify all that had been previously said by the court on the same subject.

Finally, the appellant again complains of the amount of the verdict, and asks for a reversal on that ground. But, while it is true that the evidence in favor of the plaintiff is pretty much the same as it was on the former hearing, and that there appears to be but little in the record to warrant a finding that the conductor acted in a wanton manner, yet we realize that the respondent has the right, in virtue of the constitution, to have that issue tried by jury, and since there has been two separate trials with practically the same results in each, we feel that it would be an injustice to require a third trial on the particular ground. The right of trial by jury being a constitutional right, the courts, in law

actions, may not take questions of fact away from them and determine such questions for themselves merely because they do not agree with the jury's findings. While we have no doubt of our power to grant new trials where verdicts appear excessive, yet it is a power that should be exercised within reason, and only where it is reasonably plain that justice will be promoted thereby. In this case it hardly seems probable that a third trial would result in a verdict different from those heretofore returned, and this being true, certainly justice would not be furthered by another trial.

The judgment is affirmed.

MOUNT and PARKER, JJ., concur.

[No. 9057. Department One. March 13, 1911.]

EVA ENNIS DOBBINS, *Respondent* v. DEXTER HORTON & COMPANY, BANKERS, *Appellant*.[1]

HUSBAND AND WIFE—WIFE'S SEPARATE PROPERTY—PERSONAL EARNINGS—AGREEMENT WITH HUSBAND. The evidence sufficiently shows an agreement between husband and wife that her personal earnings after marriage should be her separate property, where it appears that the money earned by her in teaching during four years after marriage was applied in completing the purchase and improving property purchased and partly paid for by her before marriage, that the proceeds of such property were thereafter invested and reinvested by her, the husband having nothing to do with the same, under a general understanding between them at all times that it and all her earnings were her separate property.

SAME—WIFE'S SEPARATE ESTATE—WHAT CONSTITUTES. The fact that the husband joined in a note and mortgage upon real estate purchased and mostly paid for by the wife before marriage does not make the property or the proceeds therefrom community property.

SAME. Assumption by the wife of mortgage indebtedness upon real estate purchased with her separate funds does not create a community obligation or make the property community property.

[1]Reported in 113 Pac. 1088.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered April 30, 1910, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to quiet title. Affirmed.

Peters & Powell and *Marion Edwards*, for appellant.

L. H. Wheeler, for respondent.

PARKER, J.—By this action plaintiff seeks to have her title to real property quieted as against a claim of lien thereon, made by the defendant under a judgment rendered in its favor in the superior court for King county against her husband upon a community debt. The question presented is whether or not the property involved was her separate property, and as such free from the lien of this judgment. The defendant has appealed from a decree adjudging the property to be plaintiff's separate property and therefore not subject to the lien of the judgment.

In the year 1895, respondent entered into a contract for the purchase of a lot in Aberdeen, paying a portion of the purchase price in cash. She had been engaged in teaching some years previous to that time and had accumulated about $1,000. In June, 1896, she was married to D. N. Dobbins, and they have ever since been husband and wife. A few months after their marriage she made final payment upon the lot and procured a deed therefor in compliance with her contract. About this time she borrowed some money, securing it by a mortgage upon the lot. This mortgage and the note accompanying it were executed by both herself and husband. The money so borrowed by her she expended in the construction of a dwelling upon the lot, and probably paid a small balance therefrom upon the purchase price of the lot. This debt was thereafter paid by her in monthly payments from money earned by her in teaching, covering a period of some four years following her marriage. There was practically nothing furnished by the husband in either money or property towards the purchase of the lot or the

making of the improvements thereon. He did furnish a very small quantity of lumber, but we regard that of no consequence in determining the question of his community interest in the property. In January, 1906, she sold this property, receiving therefor $1,783.35, after paying expenses incident to the sale. A short time before she received the money upon this sale, she moved to Seattle and entered into a contract for the purchase of a house and lot, which for convenience we will call the Eighteenth avenue place. She was to pay therefor $2,700 and assume a $3,000 mortgage already on the property. The husband had nothing whatever to do with this deal.

When she received the proceeds of the Aberdeen property she completed the purchase of the Eighteenth avenue place by paying all of the $2,700 in cash, save about $150 for which she gave her personal note. The money then paid by her, in addition to the proceeds of the Aberdeen property, was from her personal earnings acquired either before or after marriage, which had been loaned by her in the meantime. She then received a deed for the Eighteenth avenue place subject to the $3,000 mortgage. Thereafter she sold the Eighteenth avenue place, which sale netted her about $5,000, the purchaser assuming the mortgage thereon. Thereafter she purchased the property here involved, paying therefor $1,700 in cash and assuming a $3,000 mortgage thereon. This mortgage is still unpaid. Her husband had nothing whatever to do with this deal. The evidence convinces us that the husband has never made any material contributions towards the acquisition of any of these properties, and that all of them were acquired by respondent as the product of her personal earnings. Respondent claims that there was an agreement between herself and husband, existing at all times since their marriage, to the effect that the personal earnings should be her separate property. She testified relative to this understanding as follows:

"Q. Have you talked with your husband something about this being your separate funds, this money that you received

from teaching? A. Yes, sir. Q. What has been said by him in relation to that, that particular matter, of whether those funds should be your separate funds, or otherwise? A. There has never been any disagreement about it. It has always been conceded by Mr. Dobbins that it is my property; and my money is my own to do what I chose with it. Q. That this money that you got from teaching is your separate funds? A. Yes, sir. . . . Q. Now, as a matter of fact, there has never been any formal discussion between you as to who should control any moneys or any properties? A. Yes, sir, certainly. We have never had any written contract; but certainly I control my own money. He has never—— Q. He has never asked for leave to control it, has he? A. Never. Q. It has just gone along as a matter of course, that you received the income? A. He has frequently said that it was mine to do what I pleased with it."

It would hardly be correct to say that the personal earnings of respondent were accumulated while she was living separate from her husband, so as to render them separate property under Rem. & Bal. Code, § 5920; though, for the purpose of throwing light on the understanding of the parties as to such earnings being her separate property, it is worthy of note that the evidence shows that they were separated during a large part of the time she was earning the money as a teacher, after marriage, which was applied in payment of the mortgage upon the Aberdeen property. This separation was not because of disagreement between them, but evidently for business reasons. During this separation, she continued to live on the Aberdeen property, while he was absent at Seattle and employed there. At all times since the marriage, she has managed her business affairs, so far as her separate earnings and the acquisition of these properties is concerned, as if she was an unmarried woman, all without any control whatever by her husband.

It seems to us that these facts are sufficient to show such an agreement between respondent and her husband as resulted in all of her personal earnings after marriage becoming her separate property. It is true that, if we look in this

evidence for some such specific agreement at some specific time, we may not be able to find it in clear and formal language; but taking her testimony as to the general understanding between herself and husband, in contradiction of which there is not a syllable of evidence, and the fact of the management of her earnings and the property acquired thereby without the slightest control of or interference by her husband, we cannot escape the conclusion that it was at all times since their marriage well understood by both of them that her earnings were to be her separate property. *Yake v. Pugh*, 13 Wash. 78, 42 Pac. 528, 52 Am. St. 17; *Corbett v. Sloan*, 52 Wash. 1, 99 Pac. 1025. This being true, of course the property acquired through her separate earnings also became her separate property. This is not a case of seeking to establish an agreement between a husband and wife as to the status of real property. Such an agreement, of course, could not be established by oral evidence. *Graves v. Graves*, 48 Wash. 664, 94 Pac. 481. This real property did not become separate property because of any agreement as to its status, but because it is the product of the wife's separate earnings which had become her separate property by agreement with her husband.

It is contended that the execution of the note and mortgage upon the Aberdeen property by both the husband and wife, and the use of the proceeds of that loan to pay a balance due upon the purchase price of that property and to improve the same by building a dwelling thereon, rendered it community property. The case of *Heintz v. Brown*, 46 Wash. 387, 90 Pac. 211, 123 Am. St. 937, may seem to lend support to this view. We think, however, that case is distinguishable from this. In that case the contract for the purchase of the land was made after marriage, while in this case it was made before marriage. In that case the contract was made presumably in the interests of the community, while the contract in this case, of course, was not so made, because there was then no community. In that case we are to pre-

sume that the community paid the loan which produced the money to pay for the land, and hence, the community did actually contribute to the purchase price; while in this case the community did not so contribute, but the whole of the loan was actually paid from the separate funds of the wife. In that case the community actually assisted in carrying out a contract for the purchase of land entered into after marriage, while in this case the husband only joined in the execution of a note and mortgage, thereby assisting in the carrying out of the contract for the purchase of the Aberdeen property, which contract had been made before marriage, and to the payment of which loan neither the husband nor the community ever contributed anything. We think it can be said in this case that the wife's separate funds actually produced all of these properties, notwithstanding there may possibly be a technical sense in which it could be said the loan, evidenced by the note and mortgage executed by both husband and wife, contributed to the acquisition of the Aberdeen property. We treat the question as though no rights were here involved except those of the husband and wife, so far as that property is concerned, since appellant's rights did not arise until years afterwards. We are of the opinion that the husband acquired no interest in that property.

It may be said that the assumption by respondent of the mortgage on the Eighteenth avenue place, and the assumption of the mortgage upon the property here involved, had the effect of creating a community obligation in the acquisition of those properties. We think such is not the case, in view of the evidence showing that those transactions were consummated as a part of the management of her separate property. *United States Fid. & Guar. Co. v. Lee*, 58 Wash. 16, 107 Pac. 870.

We conclude that the decree should be affirmed. It is so ordered.

DUNBAR, C. J., MOUNT, and MORRIS, JJ., concur.

[No. 9294. Department One. March 13, 1911.]

L. B. WISNER, *Respondent*, v. CHARLES F. RICHARDS, *Appellant*.[1]

LANDLORD AND TENANT—NOTICE TO QUIT—REVOCATION—BONUS. After the landlord has given notice terminating a tenancy, whereby a bonus to the tenant attaches, he cannot revoke the notice upon the ground of his own mistake, without the consent of the tenant.

SAME—LEASE—BONUS—FORFEITURES. The exercise of an option to terminate a lease by payment of a bonus presents no features of a forfeiture.

SAME—LEASE—BONUS—TENDER—WAIVER. Where a lease provides for a bonus to the tenant in case the landlord gives notice terminating the term, tender of the bonus need not be given with the notice, and surrender of the premises without demanding the bonus in advance does not waive the tenant's right to recover the bonus.

FULLERTON, J., dissents.

Appeal from a judgment of the superior court for King county, Main, J., entered October 11, 1910, upon the pleadings in favor of the plaintiff, in an action on contract, after a hearing before the court without a jury. Affirmed.

Peters & Powell, for appellant.

William R. Bell, for respondent.

PARKER, J.—The plaintiff seeks to recover $300 as a bonus, claimed to be due her from the defendant upon the surrender of leased premises before the expiration of the term stipulated in the lease. Judgment was rendered in her favor upon the pleadings, and the defendant has appealed.

The facts appearing in the complaint are briefly these: On December 31st, 1908, appellant leased to respondent a residence in Seattle at $100 per month, payable monthly in advance, for the term of nine months from January 1st, 1909. By the terms of the lease, respondent agreed, among other things, "to vacate the house at thirty days notice for a cash bonus of $300." She entered into possession, and continued

[1]Reported in 113 Pac. 1090.

to occupy the house until September 1, 1909, being one month less than the full term. On August 2, 1909, appellant gave to respondent written notice as follows:

"Harper, Wash., Aug. 2-09.

"Mrs. L. B. Wisner,

"Dear Madam: The lease you have on my house at 1713 Belmont Ave. expires Sept. 1st. You will make arrangements to vacate at that time. I will be there on above date.

"Respy. Chas. F. Richards."

Relying upon this notice and the terms of the lease, respondent vacated the house on September 1st. She prayed for judgment against appellant for the bonus of $300 specified in the lease. The appellant admits the making of the lease contract and the giving of the notice as alleged by respondent, and as an affirmative defense alleges that, the notice was given, "under a mistake of the defendant in this, that he was under the impression at the time of sending such notice that the nine months of the lease expired with the first day of September, 1909, and not with the last day of September, 1909; that prior to the first day of September, 1909, and while the plaintiff was still in possession of said premises, the defendant then discovering his mistake, notified the plaintiff thereof and that she might remain in the premises until the end of the lease, that is, until the end of September, 1909." The pleadings being in this condition, respondent moved for judgment thereon, according to the prayer of her complaint, which motion was granted.

It is contended in behalf of appellant that when he notified respondent of his mistake, and of his waiver of his notice to quit, while she was still in possession of the house, the notice thereby became ineffectual for any purpose. There would be merit in this contention if appellant's right to have the tenancy continued under the lease depended entirely upon his waiver of his notice to quit, but we think such is not the law. The effect of such a notice upon the tenancy cannot be changed at the will of one of the parties alone. Unless both

the landlord and tenant agree, after the giving of such notice, that it shall be ineffectual to terminate the tenancy, it will not cease to have such effect; provided, of course, the landlord is entitled to terminate the tenancy by such a notice, as he clearly was so entitled in this case.

In 1 Wood on Landlord and Tenant (2d ed.), § 44, the rule is stated thus:

"When a valid notice to quit is given by landlord or tenant, the party to whom it is given is entitled to count upon it, and it cannot be withdrawn without the consent of both parties."

See, also, 24 Cyc. 1334; *Western Union Tel. Co. v. Pennsylvania R. Co.*, 120 Fed. 362, 385; *Re Magee and Smith*, 10 Manitoba 1.

It is clear, under the express terms of this lease, that appellant had an option to terminate the tenancy in this manner, rendering himself liable to pay the bonus, and when he gave to respondent the notice to quit, she was at that instant bound by the notice. It would not do to say that the landlord could thereafter make this notice ineffectual or not as he might choose, according to what was in his own mind, and not communicated to respondent at the time of giving the notice. If she was bound by the notice, as of course she was by the express provisions of the lease, it necessarily follows that he was also bound, and neither could be released from this mutual obligation unless both thereafter so agreed. The tenancy having been terminated at the election of the appellant before the expiration of the term agreed upon, he became liable to pay the bonus.

Learned counsel for appellant argue that this situation presents a question of forfeiture, and that, therefore, we are to be influenced by the apparent hardship and unfairness of enforcing the contract strictly according to its terms. We are quite unable to see any element of forfeiture involved. Respondent is not entitled to the $300 because appellant has forfeited it to her under the terms of the contract, but because he has agreed to pay her that sum for a surrender of the

unexpired term at any time he may elect during the term, and she has agreed to give him that option.

It may be suggested that the fact that appellant did not tender the $300 with his notice to quit rendered it ineffectual to terminate the tenancy, but the bonus was not due at the time of giving the notice. Respondent could not enforce payment of the bonus until she surrendered the premises. When the notice was given she had a right to presume that the bonus would be paid at the proper time. We do not think appellant can complain because she surrendered the premises without demanding payment of the bonus in advance thereof. The notice created his obligation to pay it, and she had the right to rely upon that obligation.

The judgment is affirmed.

DUNBAR, C. J., and MOUNT, J., concur.

FULLERTON, J., dissents.

[No. 9223. Department One. March 13, 1911.]

In re JACKSON STREET, SEATTLE.

JAMES ROE *et al.*, *Appellants*, v. THE CITY OF SEATTLE, *Respondent*.[1]

MUNICIPAL CORPORATIONS—IMPROVEMENTS—ASSESSMENTS—PROCEDURE—JURY. Under Const., art. 7, § 9, providing that the legislature may vest the municipal authorities with power to make local improvements by special assessment or taxation, it is not necessary that a jury be impaneled in order to levy the assessment, and Rem. & Bal. Code, §§ 7768, 7790 *et seq.*, are not unconstitutional in authorizing assessments by commissioners, subject to review by the courts, without any jury trial.

SAME—ASSESSMENTS—EXPENSES. An assessment for local improvements may include the costs of the city attorney, expenses of the city engineer, and of the eminent domain commissioners, incurred in the proceeding.

[1]Reported in 113 Pac. 1112.

SAME—OBJECTIONS—WAIVER. Owners petitioning for a street of a certain width cannot object to confirmation of the assessment on the ground that the width was unnecessary.

SAME—ASSESSMENTS—AMOUNT—REVIEW. An apportionment of benefits by the eminent domain commissioners will not be disturbed on appeal on the ground that it was not according to the benefits, where there was a diversity of opinion between the witnesses and the evidence was not sufficient to overcome the report.

SAME—BENEFITS—BOUNDARIES OF DISTRICT—REVIEW. The decision of the eminent domain commissioners determining the boundaries of a local improvement district to be assessed for benefits will not be disturbed on appeal because of differences of opinion as to the propriety thereof.

Appeal from a judgment of the superior court for King county, Albertson, J., entered June 8, 1910, confirming an assessment roll for a local improvement, after a hearing before the court on the merits. Affirmed.

William Martin, for appellants.

Todd, Wilson & Thorgrimson, for appellants Dilling *et al.*

Scott Calhoun and *King Dykeman*, for respondent.

MOUNT, J.—This appeal is from a judgment of the superior court of King county, confirming an assessment roll in an assessment district for street improvement purposes. The city of Seattle, by ordinance, provided for widening Jackson street in said city, from Fourth avenue to Fourteenth avenue south, to a width of ninety-six feet, by appropriating fifteen feet of land on each side of the street. Proceedings in condemnation were had, and judgments were entered in favor of the various property owners for land taken, and thereafter the matter was referred to the board of eminent domain commissioners of the city of Seattle, who prepared an assessment roll to pay the costs of the property taken. Objections to the roll were made by persons interested, and the roll was afterwards confirmed by the superior court. This appeal is prosecuted from that judgment.

It is argued by the appellants that the act under which the proceedings were had, viz., chapter 153, Laws of 1907, p.

316 (Rem. & Bal. Code, § 7768 *et seq.*), and the amendment thereof, found in chapter 211, Laws of 1909, p. 724 (Rem. & Bal. Code, § 7790 *et seq.*), are unconstitutional, for the reason that the act gives cities the right to condemn property of its citizens and deprives them of their property without trial by jury. The act is not subject to this objection. The land taken was condemned, and under the provisions of § 7 *et seq.*, Laws of 1907, page 318 (Rem. & Bal. Code, § 7774 *et seq.*), a jury was impaneled and assessed the damages for the property taken. Thereafter a special assessment was made upon the property specially benefited, to pay for the benefits. The constitution provides, at § 9, of art. 7:

"The legislature may vest the corporate authorities of cities, towns, and villages with power to make local improvements by special assessment, or by special taxation of property benefited."

This constitutional provision is clear to the effect that the legislature may authorize cities to make local improvements by special assessments upon property benefited, which was done in this case. It is not necessary, in order to levy such an assessment, that a jury shall be impaneled therefor. In *In re Westlake Avenue*, 40 Wash. 144, 82 Pac. 279, speaking to the power of the courts in such matters, we said:

"The state legislature gave the city the authority to levy such a tax. It provided the method by which it should be done. By this plan, the apportionment of the tax to the various parcels of property is made by a board of commissioners appointed by the court. These commissioners, by operation of law, become, in effect, officials or agents of the municipality for the performance of this service. Upon the completion of the commissioners' work, it may be called in question by any interested person before the court, which is invested with revisory powers. The function of the court in these proceedings is to settle disputes and to correct errors and inequalities called to its attention, and thereby relieve the assessment of any lack of uniformity or other injustice."

See, also, *Seattle v. Seattle & Montana R. Co.*, 50 Wash. 132, 96 Pac. 958. The language there used is applicable to this

case, and the reasoning in that case is conclusive of the constitutional objection made here.

Appellants also argue that the assessment contains an item of illegal costs, because it includes costs of the corporation counsel, expenses of the city engineer, and also of the eminent domain commission. This question was decided adversely to appellants' contention in *In re South Shilshole Place*, 61 Wash. 246, 112 Pac. 228.

Appellants further argue that the street was improved to an unusual and unnecessary width, and that the assessments were not proportional to the benefits. It is sufficient answer to the objection to the width of the street to say that the appellants themselves petitioned for a street of that width and cannot now be heard to say that the street is wider than necessary. There was diversity of opinion between the witnesses who testified upon the subject relating to the benefits accruing. A number of witnesses were of the opinion that the benefits were less than fixed by the eminent domain commission, but we are of the opinion that the evidence was not sufficient to overcome the report of the commission. Upon this question we said, in *In re Seattle*, 46 Wash. 63, 89 Pac. 156:

"The questions suggested by the objections cited, it will be noticed, are principally questions of fact, and questions, moreover, which are incapable of solution with mathematical exactness, and into which the judgment and opinion of the individual or individuals who undertake their solution must largely enter. It is not difficult, therefore, to find persons who will take issue with the judgment of the persons who make the assessment, and who will testify to the incorrectness of the assessment as returned."

The same is also true upon the question of the extent of the district, which is raised here. Upon this latter subject we said, in *Seattle v. Meteor Land Co.*, 50 Wash. 402, 97 Pac. 444:

"In this class of cases, opinions will differ widely as to the proper boundaries for an assessment district, and as to the benefits to accrue to the different properties within the dis-

trict; but this court cannot substitute its judgment for the judgment of those whom the law has charged with the duty of establishing the district and apportioning the cost, whenever such difference of opinion may arise."

We find no merit in any of the contentions of the appellants in the case, and the judgment is therefore affirmed.

DUNBAR, C. J., PARKER, and FULLERTON, JJ., concur.

[No. 9000. Department One. March 14, 1911.]

THE STATE OF WASHINGTON, *on the Relation of Nicomen Boom Company, Respondent*, v. NORTH SHORE BOOM & DRIVING COMPANY *et al., Appellants*.[1]

APPEAL—DECISION—SUBSEQUENT APPEAL—LAW OF CASE—JUDGMENT—CONCLUSIVENESS. A decision of the supreme court directing judgment against certain parties for a certain sum for boomage charges is final and conclusive, on a second appeal, as to the jurisdiction of the court and the liability of the several parties, where all the questions presented were, or might have been, raised on the first trial.

Appeal from a judgment of the superior court for Pacific county, Rice, J., entered April 26, 1910, in favor of the plaintiff, in contempt proceedings, after a trial on the merits before the court without a jury. Affirmed.

Chas. E. Miller, for appellants.

W. W. Cotton, *Welsh & Welsh*, and *James G. Wilson*, for respondent.

MOUNT, J.—This is the second appeal in this case. When it was here before, the judgment was reversed, and the case "remanded with instructions to enter a judgment in accord with this opinion." 55 Wash. 1, 103 Pac. 426. We there determined that the Nicomen Boom Company was entitled to a judgment against these appellants for the amount of forty

[1]Reported in 113 Pac. 1104.

cents per thousand feet, board measure, upon 42,165,453 feet of logs. The trial court thereafter, in accord with that mandate, entered a judgment against the North Shore Boom & Driving Company, John W. Kleeb and John F. Hobi, and in favor of the Nicomen Boom Company, for $16,866.18, together with interest and costs, amounting altogether to $19,651.83. This appeal is prosecuted from that judgment.

The appellants now argue, (1) that this court was without jurisdiction to direct such judgment, and that the trial court was without jurisdiction to enter it; (2) that the appellants were not liable for logs boomed prior to January 16, 1906; and (3) that appellants John W. Kleeb and John F. Hobi could not be held liable for the profits of booming logs which were their individual property, which they had forbidden the respondents to boom. If it were conceded that there is any merit in any of these points, the appellants are not in a position to urge them at this late date. Each one of these points was necessarily in the case when it was here before, and that was the time when they should have been raised and decided. The decision upon the other appeal was final and conclusive upon the appellants in this case as to all points which were, or could have been, raised therein.

"Questions determined on an appeal, or which might have been if presented, will not be considered by an appellate court upon a second appeal of the same action." *State v. Boyce*, 25 Wash. 422, 65 Pac. 763.

See, also, *State ex rel. Holgate v. Superior Court*, 19 Wash. 114, 52 Pac. 522; *Dennis v. Kass & Co.*, 13 Wash. 137, 42 Pac. 540; *Smith v. Seattle*, 20 Wash. 613, 56 Pac. 389. In the last case the reason of the rule is stated, on page 614, as follows:

"While it is true that the point was not raised on the former appeal, it is patent that it might have been, and we think it would be a bad and unwarranted practice to permit the point to be urged now. In support of its general demurrer, respondent was entitled to urge the insufficiency of

the complaint from any standpoint, and must be held to have waived every point not presented at the former hearing. Any other practice would result in cases coming here piecemeal, delaying litigation, increasing the expense to parties litigant and burdening the court with unnecessary labor."

All the issues in the case were determined upon the former appeal, and a judgment was directed, and was entered as directed, without further evidence. This appeal does not present any new question raised by reason of the entry of the directed judgment. It simply presents questions which should have been, or were, raised upon the other appeal, which, as we have seen above, may not be done. We are satisfied there is no merit in any of the questions presented now; but in view of the rule above stated, we deem it unnecessary to discuss them.

The judgment appealed from is therefore affirmed.

DUNBAR, C. J., PARKER, and MORRIS, JJ., concur.

[No. 9056. Department Two. March 14, 1911.]

ANNA M. L. THOMSON, *Respondent* v. HEINREICH JACOB KOCH *et al.*, *Appellants*.[1]

USURY—DISCOUNTING COMMERCIAL PAPER—BILLS AND NOTES—NEGOTIABILITY. The discounting of a "wheat" note obligating the maker to grow and deliver certain wheat, is not usurious, within Rem. & Bal. Code, § 6250, providing that the discounting of "commercial" paper, shall be considered as a loan within the usury laws; since it is not commercial paper, within Rem. & Bal. Code, §§ 3392, 3396, providing that an instrument to be negotiable must be payable in money without any promise to do any additional act.

BILLS AND NOTES—NEGOTIABILITY—INDORSEMENT. The indorsement of a nonnegotiable "wheat" note, operates merely as an assignment and does not make the assignor liable thereon.

[1]Reported in 113 Pac. 1110.

Usury—Discounting Paper—Liability of Borrower—Statutes. The discounting of a note, which was originally free from the taint of usury, is not usurious where no recovery was sought against the assignee and he did not render himself liable thereon, within Rem. & Bal. Code, § 6250, providing that the discounting of commercial paper where the borrower makes himself liable as maker, guarantor, or indorser, shall be considered as a loan within the usury laws.

Usury—Defenses—Usurious Transfers. The usurious discounting of a note and mortgage is no defense to a suit by the transferee against the maker.

Appeal—Review—Cross-Appeal—Necessity. The respondent having failed to appeal from a judgment in favor of appellant for costs, error therein cannot be corrected on affirming the judgment against appellant.

Appeal from a judgment of the superior court for Adams county, Holcomb, J., entered May 27, 1910, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to foreclose a mortgage. Affirmed.

Lovell & Davis, for appellants.

Warren W. Tolman, for respondent.

Morris, J.—Appeal from a decree of foreclosure of mortgage, upon a defense of usury. There is no statement of facts in this case, and the question submitted must be determined upon our holding as to the decree being justified by the findings of fact, from which it appears, that on February 17, 1906, appellants Koch, being indebted to Daniel Schulz in the sum of $3,400, executed and delivered to Schulz the following instrument:

"$3,400. Ritzville, Wash., 2-17-1906.

"On or before six years after date, without grace, I promise to pay to the order of Daniel Schulz thirty-four hundred and no-100 dollars in gold coin of the United States of America, of the present standard value, with interest thereon, in like gold coin, at the rate of 8 per cent per year from date until paid, for value received. Interest to be paid yearly

and if not so paid, the whole sum of both principal and interest to become immediately due and collectible, at the option of the holder of this note. And in case suit or action is instituted to collect this note, or any portion thereof, I promise and agree to pay, in addition to the costs and disbursements provided by statute, two hundred dollars in like gold coin, for attorney's fees in said suit or action.

"Due on or before 2-17-1912. Heinreich Jacob Koch.
"At Ritzville, Wash. Anna (X) Mary Koch.
"Her mark.
"Witnesses: W. R. Cunningham, Sr.
"J. S. Graves.

"The above note is given with the understanding that Heinreich Jacob Koch will put 1-2 of the E. 1-2 of Sec. 25 and 19 N. R. 33, E. W. M., and 1-2 of the S. 1-2 of the S. 1-2 of Sec. 30, T. 19 N. R. 34, E. W. M., every year after 1906, in wheat, either fall or spring wheat, and deliver 1-2 of the wheat grown on this land, free of cost to Daniel Schulz, each year at some warehouse in Ritzville, Wash.; the receipts for the same to be taken in the name of Daniel Schulz, and when the whole amount of said wheat shall be delivered any year, then it shall be sold and the proceeds of sale shall be credited on the interest and principal of said note, and this system of payment shall continue on said note for six years, unless Heinreich Jacob Koch shall have delivered wheat sufficient to pay said note, both principal and interest. While it is understood that the delivery of half of the wheat each year is compulsory with Heinreich Jacob Koch, yet he has the privilege to deliver more wheat each year if he chooses to do so. After six years from the date of this note, the wheat payments will cease, and Heinreich Jacob Koch will pay the balance on said note, both interest and principal with money of the U. S., he, however, at any time is privileged to settle this note in U. S. money, but he cannot be forced to settle this note before the expiration of six years from the date of the note February 17, 1906. It is understood that 1-2 of the wheat grown, harvested and threshed on the E. 1-2 of Sec. 25 and 19 N. R. 33, E. W. M., in 1906, will be delivered in some warehouse in Ritzville, Wash., free of cost to Daniel Schulz, and when sold must be credited on the above note. The above note will be secured by a second mortgage on the E. 1-2 of Sec. 25, T. 19, N., R. 33, E. W. M., and the

S. 1-2 of the S. 1-2 of Sec. 30, T. 19 N. R. 34, E. W. M., all of said land being in Adams county, Wash.

"Ritzville, Wash. Feb. 17, 1906 Heinreich Jacob Koch.
"Anna (X) Mary Koch.
"Her mark.
"Witnesses: W. R. Cunningham, Sr.
"J. S. Graves."

On August 8, 1906, Koch and wife, to secure the indebtedness evidenced by this instrument, executed and delivered a second mortgage to Schulz upon the lands therein described, which mortgage and the instrument it secured were, on August 18, assigned to respondent for $2,800, of which sum Schulz received $2,600, the balance being paid to one Cunningham who negotiated the transfer. In addition to this assignment, Schulz and wife executed and delivered to respondent, as further security for the payment of the original $3,400 a mortgage on other lands. Koch paid the interest on this indebtedness up to February 17, 1909, and $250 on the principal, on March 17, 1908. On February 23, 1910, respondent commenced foreclosure proceedings upon both mortgages, because of default in the payment of interest due February 17, 1910. Appellants answered in the foreclosure proceedings, claiming the transaction between respondent and Schulz was a usurious one, and seeking the benefit of our usury statute, which if applied would wipe out the entire indebtedness and leave a surplus of $386.30, in which sum they asked judgment against respondent. Upon these facts the court concluded, as a matter of law, that the transaction between Schulz and respondent was a loan of $2,800, and was usurious, and nothing was due from Schulz to respondent; that this usury, however, did not taint the original indebtedness of $3,400, represented by the note and mortgage executed by Koch to Schulz and assigned to respondent, and that as to this mortgage respondent was entitled to a decree of foreclosure for the amount found due, some $3,150, with interest from February 17, 1909. Schulz was given judgment for

costs. From the decree so entered, Schulz and Koch appeal.

We might add that respondent in her brief states that she took a cross-appeal from the judgment because of the failure to award a foreclosure of the Schulz mortgage and his award of costs, but finding no such cross-appeal in the record here, we will treat the case only upon the Schulz and Koch appeal. Our statute, Rem. & Bal. Code, § 6250, provides:

"Every loan or forbearance of money, goods, or thing in action shall bear interest at the rate of six per centum per annum where no different rate is agreed to in writing between the parties. The discounting of commercial paper, where the borrower makes himself liable as maker, guarantor or indorser, shall be considered as a loan for the purposes of this chapter."

In order, therefore, to hold the transaction between respondent and Schulz usurious, we must first hold that the note from Koch to Schulz, transferred to respondent by Schulz writing his name on the back thereof, is "commercial paper" within the meaning of this section, and that the transaction was a discounting of such paper whereby Schulz made himself liable as "maker, guarantor or indorser." The whole instrument, including the promise to pay in money and the agreement to deliver one-half the wheat grown each year as a payment, must be taken together and construed as one instrument. Daniel, Negotiable Instruments, § 51; *Polo Mfg. Co. v. Parr*, 8 Neb. 379, 30 Am. Rep. 830; *Hill v. Huntress*, 43 N. H. 480; *Singer Mfg. Co. v. Haines*, 36 Mich. 385; *Weeks v. Medler*, 20 Kan. 57; *Shattuck v. Hart*, 98 Mich. 557, 57 N. W. 818. So reading the instrument, it is not commercial paper, for it lacks an absolute essential to all "commercial paper," as that term is used in interest and usury statutes, in that it is not for the payment of money only, and is therefore not negotiable.

"No rule of commercial paper is better established than that which requires it to be for the payment of money and money only." Randolph, Commercial Paper, § 96.

Our law relating to negotiable instruments, Rem. & Bal. Code, § 3392, provides:

"An instrument to be negotiable must conform to the following requirements . . .

"(2) Must contain an unconditional promise or order to pay a sum certain in money."

Rem. & Bal. Code, § 3396, provides:

"An instrument which contains an order or promise to do any act in addition to the payment of money is not negotiable."

The instrument before us violates these statutory requirements of negotiable instruments. It does not contain an unconditional promise to pay in money. It is payable in wheat, the delivery of which is by its terms made compulsory. It contains a promise to do an "act in addition to the payment of money," to deliver at least one-half the wheat crop each year at a warehouse in Ritzville. These provisions destroy its character as commercial paper or a negotiable promissory note, and make it a mere contract.

Many authorities might be cited in support of this view, but our statute is so plain it seems unnecessary to look beyond it. Not being a negotiable instrument or commercial paper, the transaction between respondent and Schulz was not a "discounting of commercial paper," and therefore not within the provisions of the usury law. Such transaction was nothing more than a sale or transfer of the rights of Schulz under the contract, and as such, the law permits any price to be agreed upon that is satisfactory to the parties. It may be admitted that respondent drove a hard bargain, and took advantage of Schulz's financial necessities, but such fact does not make the contract illegal, nor taint it with usury. Neither did Schulz's name on the back of the contract operate other than as an assignment of it. He did not, as required by the statute, thereby make himself "liable as maker, guarantor, or indorser." No liability whatever attached to Schulz by such act.

It was conceded by respondent when she brought the action that she was entitled to no judgment against Schulz, and none was sought; all that was asked as to him was the foreclosure of the second mortgage given to respondent. If it could be held that the transaction between Schulz and respondent was usurious, such a taint could not attach itself to the original transaction between Schulz and Koch, and invalidate that which was valid in its inception. Koch was in no wise connected with any usurious transaction, nor did he become a party to any contract that called for the payment of anything beyond legal charges. If it could be held that this so-called note was commercial paper, the making of it by Koch and its subsequent discounting by Schulz for his own benefit were two different transactions, the vice of the latter could not invalidate the former. Such, we believe, is the law:

"In a suit by the transferee against the maker it constitutes no defense that the paper was endorsed and discounted under a usurious contract at an unlawful rate of interest." Joyce, Defenses to Commercial Paper, § 304.

In *Gaither v. Farmers & Mechanics Bank*, 1 Pet. 37, it is said:

"And this is unquestionably true; for the rule cannot be doubted, that if the note be free from usury in its origin, no subsequent usurious transactions respecting it, can affect it with the taint of usury."

The same rule is announced in *Nichols v. Fearson*, 7 Pet. 103, in this language:

"There are two cardinal rules in the doctrine of usury which we think must be regarded as the common place to which all reasoning and adjudication upon the subject should be referred. The first is, that to constitute usury there must be a loan in contemplation by the parties; and the second, that a contract, which, in its inception, is unaffected by usury, can never be invalidated by any subsequent usurious transaction."

The judgment as against Koch was therefore right under

any theory. The refusal to award Schulz a judgment for the excess of the charges under the usury statute over the amount due on the note was also correct. The judgment in favor of Schulz for costs, not having been appealed from, cannot be reviewed. The judgment is therefore in all respects affirmed.

DUNBAR, C. J., CROW, and CHADWICK, JJ., concur.

[No. 9399. *En Banc.* March 15, 1911.]

E. F. BLAINE *et al.*, *Respondents*, v. THE CITY OF SEATTLE *et al.*, *Appellants*.[1]

MUNICIPAL CORPORATIONS—INDEBTEDNESS—BONDS—SUBMISSION TO VOTERS—DISTINCT PROPOSITIONS. Under const. art. 8, § 6, providing that no city shall become indebted in excess of one and one-half per cent of the taxable property without the assent of three-fifths of the voters therein voting at an election held for that purpose, a city cannot submit to the voters a bond issue to raise money for several distinct purposes, in no way related to each other, in such a way that the voters must vote for or against all the propositions; "assent" meaning that the voters shall freely express their approval of each of the various objects sought.

Appeal from a judgment of the superior court for King county, Tallman, J., entered February 15, 1911, in favor of the plaintiffs, upon overruling a demurrer to the complaint, enjoining the issuance and sale of municipal bonds. Affirmed.

Scott Calhoun and *Bruce C. Shorts*, for appellants.

P. C. Sullivan and *Peters & Powell*, for respondents.

MORRIS, J.—Respondents brought this action as taxpayers to enjoin the city of Seattle and its officers from the issuance and sale of certain municipal bonds, authorized at an election held March 8, 1910. The defendants entered a general demurrer to the complaint, which was overruled and judgment

[1]Reported in 114 Pac. 164.

as prayed for entered; whereupon the city appeals. The facts involved upon which the questions of law are predicated will be gathered from the opinion without any further or more specific statement. The election was had pursuant to an ordinance submitting to the vote of the people a proposition to issue bonds for eight several and distinct purposes, aggregating in amount $421,000. These separate purposes, and the amount involved in each purpose, were apportioned as follows: $57,500 for sites for fire houses; $50,000 for site for city stables; $173,500 for the construction of fire houses; $5,000 for a combined fire house and dock; $10,000 for a police sub-station; $25,000 for an isolation hospital; $50,000 for a bridge on Spokane avenue; $50,000 for a bridge on Westlake avenue. These eight distinct propositions were, by the ordinance, submitted in such a manner that the voter was compelled to vote for or against all of them. This manner of submission to the voter raises the only question involved on the appeal.

It is conceded that the issuance of these bonds would make the indebtedness of the city exceed the limitation fixed in art. 8, § 6 of the constitution, providing, so far as is here applicable, that no municipal corporation shall for any purpose become indebted to an amount exceeding one and one-half per centum of the taxable property, without the assent of three-fifths of the voters therein, voting at an election to be held for that purpose. The city of Seattle, as a city of the first class, is by general law given power to borrow money for corporate purposes in such manner as shall be prescribed in its charter, and may borrow money or contract indebtedness for municipal purposes exceeding one and one-half per centum of its taxable property, with the assent of three-fifths of the voters at an election held for that purpose and in the manner presented by the city council, not inconsistent with the general election law. The charter of the city provides for the issue of bonds for corporate purposes in the manner prescribed in its charter and the constitution and laws of the

state. Another section provides for the submission of any intended indebtedness to the voters in the mode and manner prescribed by ordinance. Another section provides that every ordinance shall contain but one object. These are the only provisions that have any bearing upon the question before us.

It will be noted that, while the power to create a municipal indebtedness within the constitutional limitation is conferred upon the city, both by general law and its charter, and while the city may by ordinance determine the manner of submitting any proposition seeking to incur such indebtedness to the voters, the ordinance providing for such submission to the voters, and the mode and manner adopted by the city council in submitting such proposition, shall not be inconsistent with the constitution and laws of this state. If, then, the method adopted in this instance of submitting these eight propositions to the voter and compelling him to assent to or dissent from each and all of them or lose his vote is inconsistent with the constitution and laws of the state, it must fail. The constitutional inhibition as to such indebtedness as is here sought to be created is that no city shall for any purpose become so indebted in any manner, without the assent of three-fifths of the voters, voting at an election held for that purpose. What is the meaning of this provision, if not that no city, whatever its purpose may be, however needful or meritorious may be the object, however necessary to the safety, good health, or general welfare of its citizens, may not incur an indebtedness beyond the one and one-half per cent of its taxable property, unless three-fifths of the voters shall assent? What is the public policy created by such a provision, if not that the voter shall freely, voluntarily, and with a full knowledge of the purpose of the election and the object to be attained thereby, consent to the laying of this additional burden of taxation upon his property? The assent of the voter here means more than his affirmative vote; it was intended to mean a vote cast with his approval of the object sought. "Assent"

means that the election shall be held in such a way as to obtain a free and intelligent expression of the voters' approval or disapproval upon the object of the contemplated indebtedness. It is the evident and manifest purpose of this provision that no indebtedness shall be created except its purpose meets with the free assent and approval of three-fifths of the voters who may desire to express their views upon the object sought, and any election held for the purpose of creating such an additional municipal indebtedness is not an election within the meaning of this constitutional provision, when it is held under such restrictions as to prevent the voter from casting his individual and intelligent vote upon the object or objects sought to be attained. *Woodlawn v. Cain*, 135 Ala. 369, 33 South. 149.

How can a voter express his free and intelligent assent to such an additional burden of taxation when, in order to so express it, he is compelled to express a like assent to other measures, with which he is not in sympathy nor accord, and against which, if given the opportunity, he would cast his vote. Here we have eight separate and distinct propositions upon which as a whole the voter must assent or dissent. Some he favors, others he is opposed to; and yet, in order to express his assent upon those he favors, and which in his judgment are needful for the city's growth and prosperity, he must likewise express, not an intelligent nor free, but a controlled and compelled assent to measures he deems harmful. As is said in the case cited, "to declare an election of this kind valid would be to take from the people the right and power to control in this matter of additional taxation and vest it exclusively, practically, in those charged with the duty of calling the election, for they could defeat any measure, however beneficial and popular, by coupling with it a proposition ruinous and altogether objectionable, and they could secure many undesirable and vicious measures by coupling with them others necessary to the welfare of the community." For these reasons, an election was there held void where two propo-

sitions were submitted and the voters compelled to vote upon the propositions as a whole. The constitutional provision, that the purposes of the tax shall be stated in the election call, was held to be violated. This is not as strong a provision as that contained in our constitution, coupled with the charter provision that the election shall be had only after thirty days' notice of its purpose; but that, following the constitution, it must receive the assent of three-fifths of the voters, the latter requirement being an additional safeguard to that referred to in the case cited.

The vice of this method adopted by the city to compel an affirmative vote on all eight measures is readily apparent upon an examination of the propositions submitted, propositions in which there is nothing in common, nor any such unity of interest as would lead any one to either favor or disfavor all eight measures. Illustrating this view is the proposition for the two bridges. One calls for a bridge over the west waterway at Spokane avenue in the south part of the city, a matter in which the people of West Seattle and those interested in the waterways to the south are particularly interested, and which they deem of great value in the opening up of the Duwamish waterway scheme. The other calls for a bridge over the government canal at Westlake avenue in the northern part of the city, a project in which the people along the north end of Lake Union and the advocates of the government canal are deeply interested. There is nothing in common between these two propositions. One is a scheme for the development of the city to the north; the other a scheme for its development to the south. The people in these widely separated districts have no common interest in any local improvement. In fact, their interests from a selfish point, are as diversified and separate as the measures themselves; and yet these people, in order to get an improvement which they consider of great value and importance to their section of the city, must support another improvement in which they have

no interest. Neither can they have their bridge unless they take city stables, a sub-police station, an isolation hospital, and other as dissimilar projects with it. What sense of fairness developed such a scheme? If one were left to surmise, it might be that the popularity of the bridge projects and the enthusiasm developed by the people of the north and south ends of the city were depended upon to carry through other measures tied up with them which otherwise might have met with poor success. If you want the bridge you must vote for the sub-police station, may be a good political scheme to obtain a favorable vote; but does not appeal very strongly to a public policy which declares that the right of franchise shall be exercised freely, intelligently, and without let or hindrance, save the conscience of the voter and his honest belief in what is needful for the best interest and general welfare of the community. That such is the public policy of this state in all exercise of the elective franchise is demonstrated in the adoption of the Australian ballot system and the primary election laws, the purpose of which is to give to the voter individual action and to remove him as far as possible from any influence that would shape or control his ballot, and permit him to exercise freely and voluntarily his right of selection, whether it be for men or for measures. Any scheme, however framed, which curtails or abridges this right must yield to the wise public policy which has created it.

The charter provision providing that "the mode and manner of submitting such proposition to the voters shall be prescribed by ordinance," does not confer upon the city council the authority to adopt a scheme which contravenes and destroys the safeguards which the constitution and public policy of the state, as announced in the constitution and general laws, have thrown around the voter, to guard and protect the purity of the ballot and to preserve inviolate, in so far as the law can, the freedom of individual choice. Neither do we have to find an express constitutional provision that declares that such a submission as here made is forbidden,

in order to hold such a method of submission illegal. The constitution has a spirit as well at a letter, and in determining questions of public policy, that which violates the spirit of the constitution is as vicious as that which falls within its express prohibition. And, as is said in *Stern v. City of Fargo* (N. D.), 122 N. W. 403, if there is any conflict of authority upon this question, "we feel at liberty to adopt that rule based upon those principles which to us appear most nearly in consonance with the statute, the spirit of our institutions, and which will best protect the voter in the exercise of his franchise and the municipality against possible fraud:" the question in that case being the submission of a proposition to issue $100,000 in bonds for the construction of a waterworks pumping station and an electric light plant in connection therewith as one proposition. The court, as before intimated, admitting an apparent conflict of authority upon such a manner of submission, says—and this is peculiarly applicable to the situation here—"the authorities are nearly unanimous to the effect that a proceeding by which two questions are submitted when such questions on their subjects and purposes are not naturally related or connected, is invalid and renders any election at which such questions have been submitted invalid;" citing a large number of authorities. The ordinance calling the election in that case noted its purpose as a proposition to issue the $100,000 for the construction of the two plants without any segregation, and the law reviewed was a statute requiring notice to be given of the purpose for which it was proposed to issue bonds and a constitutional provision prohibiting the diversion of money raised by taxation for any purpose to any other purpose.

A few other authorities will be referred to. In *Gray v. Mount*, 45 Iowa 591, it is said, in dealing with a similar question:

"If there be two objects and a specified amount of funds to be devoted to each, it is plain that there are two propositions submitted at the same election. If they are submitted to-

gether, it is very clear that the voter cannot vote for one and against the other. He must vote against both, whereby he may defeat one, the success of which he desires, or he must vote for both, whereby he may cause the success of one which he desires to be defeated. If he fails to vote he may thus aid in causing the defeat of his favorite measure, and the adoption of the one he opposes. He has thus no liberty of choice . . . . The very letter as well as the spirit of our election laws condemns this plan."

Mr. Justice Brewer, in *Lewis v. Commissioners of Bourbon County*, 12 Kan. 186, at page 214, in discussing such a double submission, adds his disapproval in saying:

"It needs no argument to show the rank injustice of such a mode of submission. By it several interests may be combined, and the real will of the people overslaughed. By this combination an unpopular measure may be tacked on to one that is popular and carried through on the strength of the latter. A necessary matter may be made to carry with it some private speculation for the benefit of the few. Things odious and wrong in themselves may receive the popular approval, because linked with propositions whose immediate consummation is deemed essential. It is against the very spirit of popular election. That aims to secure freedom of choice, not merely between parties, but also in respect to every office to be filled, and every measure to be determined."

Like reasoning is employed by the courts in many cases to which we cannot refer without unnecessarily extending this opinion. Among such cases are *Rea v. La Fayette*, 130 Ga. 771, 61 S. E. 707; *Supervisors of Fulton County v. Mississippi & W. R. R. Co.*, 21 Ill. 338, 373; *City of Denver v. Hayes*, 28 Colo. 110, 63 Pac. 311; *City of Leavenworth v. Wilson*, 69 Kan. 74, 76 Pac. 400; *Cain v. Smith*, 117 Ga. 902, 44 S. E. 5; *State ex rel. Bethany v. Allen*, 186 Mo. 673, 85 S. W. 531; *Garrigues v. Commissioners*, 39 Ind. 66, and a large list of others collated in *Stern v. Fargo*, *supra*.

Counsel for the city contend that this court has approved this method of submitting like propositions in *Metcalfe v. Seattle*, 1 Wash. 297, 29 Pac. 1010; *Yesler v. Seattle*, 1

Wash. 308, 25 Pac. 1014, and *Seymour v. Tacoma*, 6 Wash. 138, 32 Pac. 1077. We do not so read those cases. The *Metcalfe* and *Yesler* cases involved the same bond issue, providing for waterworks and sewers. The question here raised was neither submitted to nor discussed by the court; the only question involved being whether an ordinance providing for waterworks and sewers violated the act of 1886, providing no ordinance shall contain more than one subject. It was held that the ordinance was double in its nature, but that this was permissible under the act of 1890 which repealed the act of 1886 in this regard, in providing that:

"Whenever the city council . . . shall deem it advisable that the city . . . shall exercise the authority hereby conferred upon them in relation to either or both such waterworks or system of sewerage or plants or works for lighting purpose, the corporation shall provide therefor by ordinance."

This statute, it was held, clearly authorized an ordinance providing for both waterworks and sewers. In the *Seymour* case the court had before it the validity of an election under an ordinance providing for the issuance of bonds for the purchase of waterworks and an electric light plant, submitted as one proposition, and it was held that, under the act of 1890 referred to in the *Yesler* case, the two questions might be submitted as one proposition; the attack being made, not on the form of the submission, but that the power conferred by the act of 1890 as amended by the act of 1891 was a power to construct and not a power to purchase, and that the ordinance failed to specify the works and plant with sufficient detail to enable the voter to determine the expediency of purchasing the property at the price named; and other like attacks in no way analogous to the question here submitted. An examination of the *Metcalfe*, *Yesler*, and *Seymour* cases discloses that the same member of this court wrote all three opinions, the last one being filed June 2, 1893. On July 25, 1893, the same judge filed an opinion in the case of *McBryde v. Montesano*, 7 Wash. 69, 34 Pac. 559, which case

was appealed to this court prior to the appeal in the *Seymour* case, and was pending for decision at the time of the decision in the *Seymour* case. The question submitted in the *McBryde* case was, whether a proposition to borrow money to fund old debts and a proposition to borrow money for future municipal indebtedness might be submitted at the same election; and it was held that it could, but that it could not be united with the proposition to borrow money for future purposes so as to have one expression of the voter answer both propositions. "They might be decided by the same ballot, but the voter must have an opportunity to express himself separately as to each one." That the court had in mind its opinion in the *Seymour* case is evidenced by the fact that such case is expressly referred to and held to have no application. It cannot be said, therefore, that the *Seymour* case is authority for the uniting of several propositions in one submission and calling for one assenting or dissenting vote upon all, in the face of the language used in the *McBryde* case, which is strongly assertive that it cannot be done, and is in accordance with the views heretofore expressed in this opinion. That Judge Stiles had these same views in mind at the time he wrote the opinions in the *Metcalfe* and *Yesler* cases is evident from this language used by him in the *Metcalfe* case:

"Clearly the intention was, that whereas such works are likely to demand large and unusual expenditures, the wisdom of which, in some cases, may be doubtful, the people who would have to furnish the means should be fully apprised of the whole scheme, and that there should be a definite, well considered, and practicable scheme presented for their rejection or adoption."

These views are in support of, rather than antagonistic to, the position we have taken.

For these reasons, we believe the scheme adopted by the city of Seattle to submit these eight propositions as one is in violation of the public policy announced in our constitu-

tion, laws, and judicial announcements, and is therefore illegal.

The judgment is affirmed.

DUNBAR, C. J., CHADWICK, MOUNT, PARKER, and CROW, JJ., concur.

[No. 9208. Department One. March 17, 1911.]

CARLISLE PACKING COMPANY, *Respondent*, v. E. B. DEMING *et al.*, *Appellants*.[1]

JURY—BREACH OF CONTRACT—ACCOUNTING. An action for breach of a contract to purchase plaintiff's pack of salmon is properly tried to a jury as a law case, and not in equity for an accounting, where the issue was as to the terms of the contract, and an accounting was only incidentally involved to determine the extent of the damages.

ACCOUNTING—TRUSTS—BREACH OF CONTRACT. On breach of a contract to purchase plaintiff's pack of salmon, whereupon plaintiff, after giving notice, resold the same on the open market, paying expenses for freight, insurance, cartage, storage, commissions etc., there is no such trust or fiduciary relation as to make the case exclusively one for an accounting.

CONTRACTS—PARTIES—PLEADING. A party defendant making a contract on behalf of two corporations should set up the fact in his answer, in order to escape personal liability, where plaintiff alleged that he made the contract acting for himself and his codefendant; and where defendants answered jointly by a general denial, all are bound jointly, if the contract is proved as alleged.

PRINCIPAL AND AGENT—CONTRACTS—PERSONAL LIABILITY OF AGENT—CORPORATIONS. Where a resident manager, who was the principal stockholder and responsible head of two foreign corporations, entered into a contract which he promised to reduce to writing, but failed to do so, so that it was left indefinite as to who the responsible parties were, he cannot claim that he was not personally liable, in the face of evidence that the other party was dealing with and relied upon him.

EVIDENCE—ACCOUNT BOOKS—ADMISSIBILITY. Account books showing items of sales made are admissible in evidence for the purpose of showing the sales and the net proceeds, even if they were not books of original entry or kept by a competent bookkeeper.

[1]Reported in 114 Pac. 172.

SAME—STATEMENTS FROM BOOKS. A statement drawn from account books is properly admitted in evidence where it was a copy from the books and a witness having personal knowledge of all the items testified that the items were correct.

PLEADINGS—OBJECTION TO COMPLAINT—AMENDMENTS TO CONFORM TO PROOF. A motion for a nonsuit on the ground that an essential fact had not been alleged in the complaint is properly denied where the motion was not made until the fact had been proved; since the complaint will be deemed amended.

TRIAL—INSTRUCTIONS—ASSUMPTION OF FACTS. Where there was no question upon a certain fact, the court may assume it to be an established fact in the case, and instruct the jury without reference to any question thereon.

Appeal from a judgment of the superior court for Whatcom county, Hardin, J., entered June 13, 1910, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Affirmed.

Kerr & McCord, for appellants.

Fairchild & Bruce and *Dorr & Hadley*, for respondent.

MOUNT, J.—This action was commenced by the plaintiff to recover the sum of $12,955, upon a claim growing out of an alleged breach of contract for the purchase of certain canned salmon of the pack of 1907. The essential allegations of the complaint are as follows:

"That on or about the ..... day of ....., 1907, the defendant E. B. Deming, acting for himself and his co-defendants, entered into a contract with this plaintiff for the purchase of all of the salmon fish packed and to be packed by this plaintiff for the season of 1907; that said agreement was that the said defendants would purchase from this plaintiff, who would sell to said defendants, all of the several grades and varieties of salmon to be packed by plaintiff during the season of 1907, and pay plaintiff for each grade of salmon the "opening price" thereof, of each grade, kind and size, and make payments as the same were shipped and within ten days from the date of delivery, with an allowance of 1½ per cent for cash discount and 5 per cent brokerage. Deliveries were to be made to some railway terminal point at the

expense of this plaintiff, and the said defendants were to furnish shipping instructions on or before February 1st, 1908, or take whatever portion remained unmoved at that time, and pay for the same, warehousing it if necessary, and all expenses of such disposition, and shipping instructions were to be given to this plaintiff at and before the time for delivery. That pursuant to said contract this plaintiff delivered to the said defendants all of its pack and the said defendants took said pack and paid for same, except as hereinafter set forth; that the 'opening prices' and sum which the defendants agreed to pay for such pack were as follows: Sockeye talls, $1.65; sockeye flats, $1.80; pink talls, 80c., pink flats, 90c.; pink halves, 60c.; that the words "talls' and 'flats' have reference to each twelve cans of one pound capacity or a half pound capacity; that each case of salmon contained four dozen cans or forty-eight cans in all, of one pound capacity; that amongst others of the pack sold to the defendants by said plaintiff were 10,903 pink flats and the opening value and price of which was 90c. per dozen, or $3.60 per case; and at the direction and upon the instruction of the said defendants said salmon were delivered between the 4th day of October, 1907, and January 1st, 1908, and the price so agreed to be paid became due and payable to plaintiff; that said defendants disregarding their contract aforesaid, after the receipt of the property as aforesaid refused to pay this plaintiff for the said 10,903 cases of pink flats and abandoned the said property to this plaintiff, after making it subject to charges for warehousing and insurance placed by the said defendants, and this plaintiff, in order to save itself, was required to take said salmon and to sell the same upon a depreciated market and at a less price than the defendants had agreed to pay, and was required to pay the insurance and warehouse charges incurred against said property; that said property was sold to said defendants at the sum of $36,786.20 and plaintiff was required to retake and sell the same for a total sum of $30,001.75, whereby it lost $6,784.45 on said salmon, and it lost on account of moneys paid out, storage and insurance $1,706.84 and on commissions the sum of $1,530.68, and it was deprived of the use of its money and was required to pay interest on account thereof amounting to $2,146.16; that because of the acts and doings of the said defendants and

their failure to keep and perform their contract as aforesaid this plaintiff has suffered loss and damage in the sum of $12,955.04, with interest thereon since January 1st, 1908."

The defendants joined in an answer denying all of the allegations of the complaint. The cause was tried to a jury, and a verdict was rendered against all of the defendants for $12,700; and on June 13, 1910, a judgment was entered in favor of the plaintiff for that sum. This appeal is prosecuted by defendants from that judgment.

It was contended by the plaintiff at the trial that, in the spring of 1907, the defendants agreed to purchase all of the canned salmon to be packed by the plaintiff during the season of 1907, at the "opening price" for such salmon for that season, from which price the defendants were to be allowed to deduct five per cent for commissions and a discount of one and one-half per cent, and that the salmon which was unsold by the defendants on February 1, 1908, should be taken over by the defendants and paid for at the opening price, less the commission and discount above stated; that defendants purchased all of plaintiff's salmon pack of that season excepting 10,920 cases of four dozen cans each; that this salmon, known as "pink flats," was abandoned to the plaintiff after it had been subject to warehouse charges and insurance created by defendants, and that on February 5, 1908, the defendants refused to pay for or take the said salmon and that plaintiff, in order to save itself, was required to pay the charges against the salmon and to sell it upon a depreciated market at less than the defendants had agreed to pay.

The defendant Deming denied that any such contract was made, but testified that he made an agreement with the plaintiff for handling the salmon of the plaintiff for the year 1907, by which agreement the Deming-Gould Company was to sell the salmon upon a purely brokerage basis; and that there was no agreement to take over the salmon for that season, but that it was agreed that upon the said date the

Deming-Gould Company would take over at the then market price all of such salmon remaining unsold, and that on February 5, 1908, Mr. Deming offered to take over all salmon in dispute at the market price on that day, which was eighty cents per dozen cans. It is conceded in the case that the "opening price" of the class of salmon in dispute was ninety cents per dozen, and that Mr. Deming took over and paid for all of plaintiff's pack for that season except the part in dispute, and paid for the same at the opening price. It is also conceded that Mr. Deming was the managing agent at Bellingham of the Deming-Gould Company of Chicago, and the vice president of the Pacific American Fisheries, and had authority to make any kind of contracts for these companies; that these companies were large dealers in canned salmon, and that Mr. Deming arbitrarily fixed the opening prices of such salmon. Other facts necessary to an understanding of the points discussed will be stated in the consideration thereof.

The appellants argue that the court erred in refusing to discharge the jury and try the case as an equity case for an accounting. In the progress of the case it appeared that the salmon in dispute had been stored in a warehouse controlled by the defendant Deming, and that upon Mr. Deming's refusal to take the fish and to pay the opening price—ninety cents per dozen, the plaintiff, through its agent, notified Mr. Deming that the plaintiff would offer the fish for sale upon the market and hold Mr. Deming upon his contract for the difference between the contract price and the net price at which the fish might be sold; that thereafter the fish were placed upon the market and sold in small lots to numerous purchasers; that upon each sale it was necessary to determine the selling price, freight charges, insurance, cartage, commissions, and other items of expense in order to arrive at the net amount received by the respondent; that the plaintiff thereby became trustee for the defendants in regard to the

sales of the property, and that an accounting became necessary.

This position might have been correct if an accounting had been the only issue between the parties; but as we view the case, this accounting, if it may be termed such, was only an incidental matter. The main and real issue in the case was whether there was a contract, and if so, what were the terms of it. This issue was made by the pleadings, and stoutly maintained from the beginning of the case to the end. It is true that by the evidence it was conceded that a contract had been entered into, but the terms of this contract were never conceded. For that reason the case was one for the jury. There was, finally, no substantial dispute that the goods were sold, or that the statement of receipts and disbursements on account of these sales made by the respondent was correct. The right of the plaintiff to recover at all depended solely upon the terms of the contract. The action was not one for an accounting, but was for a breach of contract. The respondent had sold its own goods for the best prices obtainable, and its measure of damage was the difference between the selling price and the contract price, provided the contract and breach of it were established. There was no such trust or fiduciary relation existing as would make the case exclusively one for an accounting; and the cases of *Maitland v. Purdy*, 49 Wash. 575, 96 Pac. 154, and *Goupille v. Chaput*, 43 Wash. 702, 86 Pac. 1058, and cases of that character, are therefore not in point here. Cases of this character are usually tried to a jury as a law case. See *Hayes v. Nashville*, 80 Fed. 641. The court did not err in refusing to discharge the jury.

At the close of the plaintiff's evidence, counsel for defendants moved for a nonsuit as to the defendant Deming and as to the Pacific American Fisheries, upon the ground that there was no evidence to connect these two defendants with the contract sued upon; and again, at the close of all the evidence in the case, counsel moved for a directed verdict

as to the defendant Deming. These motions were denied, and each of these rulings of the court is assigned as error. These errors are argued separately in the brief, but they all depend upon substantially the same state of facts.

It was conceded that Mr. Deming was the vice president of the Pacific American Fisheries and managing agent of the Deming-Gould Company, and had authority to bind these companies by such contracts. Mr. Wright, who was the managing agent for plaintiff, testified that while nothing was said about the matter except that Mr. Deming was to give him orders for fish *pro rata* with the Pacific American Fisheries, he understood that the contract was to be made with the Deming-Gould Company, but that he was dealing with Mr. Deming personally, and relied upon him. At the time the contract was made, Mr. Deming agreed to reduce the same to writing, but this was never done. All of the fish which were delivered under the contract were delivered and shipped upon Mr. Deming's order. Mr. Deming was in full control of the business of the other two defendants, and their responsible head. It was within his hands at the time the contract was made to make the contract definite in regard to who were the responsible parties thereto, by simply reducing the same to writing as he had agreed to do. At the time the action was begun, the plaintiff, not knowing which one of the defendants was responsible, made all three of them defendants. When the answer was filed, all of them joined therein and made a joint answer containing general denials only. If the defendant Deming desired to deny that he made the contract for himself personally or for the Pacific American Fisheries, that fact should have been set up in the answer. When all joined in the answer, they thereby took issue upon the facts jointly, and if the contract alleged was proved, all were necessarily bound jointly. 1 Ency. Plead. & Prac., p. 861; *Ex parte Lowman & Hanford Sta. & Print. Co.*, 2 Wash. 427, 27 Pac. 232. The record shows that Deming-Gould Company and Pacific American Fisheries were foreign corporations, and that Mr. Deming

was their manager and owned or controlled a majority of the stock of these corporations. Mr. Deming was a resident of Bellingham, where the contract was made. He was engaged in other business besides the business of the corporations. It will not do to say that a person so situated may make a contract and leave it indefinite for whom he makes the contract when he has agreed to reduce it to writing and thereby make it definite, and when a liability arises, then be heard to say that the contract was made for some other party. We are of the opinion, for these reasons, that the court properly denied the motions to dismiss.

At the close of all evidence in the case, the defendants Deming-Gould Company and Pacific American Fisheries filed a petition and bond for the removal of the case to the United States circuit court, upon the ground of diverse citizenship of the parties. It was contended then, and it is argued now, that defendant Deming, being a resident, was not made a party in good faith, but was made such party defendant solely for the purpose of depriving the United States circuit court of jurisdiction over the subject-matter of the action. We have held above that defendant Deming was a proper party. That ruling disposes of this question.

Appellants argue that the court erred in admitting in evidence certain books of account. It is claimed that these books were not books of original entry, that they were not complete, and were not kept by a competent bookkeeper. The court did not allow the books themselves to be admitted in evidence, but permitted a statement to be drawn therefrom, which statement consisted of the items of sales of the fish in controversy. This statement was received for the purpose of showing the sales of fish and the net proceeds thereof. We are satisfied that the books themselves might have been properly admitted under the rules stated in *Cascade Lumber Co. v. Aetna Indemnity Co.*, 56 Wash. 503, 106 Pac. 158. In effect they were admitted, because the statement received was a copy made from the books. This statement, however, was admissible ir-

respective of the fact that it was a copy of the books, because Mr. Wright, the manager of the plaintiff company, testified that he had personal knowledge of all the items of the statement, and that the items were correct. There is, therefore, no merit in this assignment.

Appellants argue that the court erred in refusing a nonsuit as to the Deming-Gould Company, for the reason that the complaint failed to allege notice of an intention to resell the fish and to hold the defendants for the difference between the contract price and the proceeds of the resale. This motion was not made until after the fact had been proved, so that the complaint will now be treated as amended in that respect. The witness Wright, upon this question, testified that, on February, 5, 1908, when Mr. Deming first denied the terms of the contract, he notified Mr. Deming that the fish would be offered for sale, and that he would sue him for the loss. The evidence also shows that Mr. Wright proceeded diligently to make a resale, but was unable to do so until late that year, and that in July he also notified the Deming-Gould Company in writing to the same effect. As soon thereafter as purchasers could be obtained, the goods were sold at a loss. There is substantially no dispute in the record upon these facts. The record is also clear to the effect that the prices obtained for the fish sold were the highest which could have been obtained for that character of fish, and that the expenses of sale were reasonable, and the verdict was not excessive.

The court gave instructions to the effect that, if the jury found that the contract was made and defendants refused to accept the goods, plaintiff would have a right to resell and recover the difference between the contract price and the net selling price; that the plaintiff might deduct from the gross selling price defendants' reasonable expenses, such as insurance, storage, cartage, freight and commissions paid brokers. It is argued that these instructions did not state the law, because they omitted the question of notice. But as we have seen above, the question of notice was not disputed, and the

court no doubt assumed that such was an established fact with which the jury were not concerned; which we think was correct. And it is clear under the evidence that the expenses named were necessary and reasonable, and that the net price received was all that the defendants were entitled to be credited with upon the contract price which they had agreed to pay. We think that the instructions given fully cover the law of the case, and that there was no error therein.

Finding no error, the judgment is affirmed.

DUNBAR, C. J., PARKER, and FULLERTON, JJ., concur.

[No. 9333. Department One. March 17, 1911.]

HART-PARR COMPANY, *Respondent*, v. JAMES KEETH, *Appellant*.[1]

PLEADING—ANSWER—INCONSISTENT DEFENSES—ELECTION. Defenses so inconsistent that one must necessarily be untrue are not permissible under the code; and in an action for the price of a traction engine, a defense that the notes and contract were only delivered conditionally and were not effective or delivered, because the engine did not fulfill conditions, is inconsistent with a counterclaim for damages by reason of the insufficiency of the engine; and defendant is properly required to elect between them.

JURY—RIGHT TO JURY TRIAL—EQUITY—LOST NOTES. An action upon lost notes, seeking their establishment and recovery upon indemnifying the defendant against liability on the original notes, is one of equitable cognizance, and defendant is not entitled to a jury trial.

Appeal from a judgment of the superior court for Spokane county, Hinkle, J., entered August 28, 1909, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to establish lost instruments and to recover thereon. Affirmed.

Gallagher, Smith & Mack, for appellant.

W. J. Matthews, for respondent.

[1]Reported in 114 Pac. 169.

DUNBAR, C. J.—This is an action to recover money on a check and notes which were lost. The complaint, among other things, alleged that on the 17th day of January, 1908, plaintiff sold to the defendant a certain gasoline traction engine, for a consideration of $2,500, which sum it was agreed should be paid to the plaintiff according to the terms of defendant's written obligation and contract, a copy of which was made a part of the complaint; that the plaintiff delivered the engine in due time, and that the defendant has since said time had the same in his possession and under his control, and has kept and used said engine for the purpose of plowing and other purposes since the delivery thereof; that on the date of the delivery, the defendant, in settlement therefor and in compliance with the terms and conditions of the written obligation, executed and delivered to the plaintiff a certain written check and promissory notes for a certain amount of money as stated in the complaint, and at the said time, to secure the payment of the same, executed and delivered to plaintiff a certain chattel mortgage in writing, covering the said gasoline engine sold and delivered as aforesaid; that the said papers were delivered to one C. A. Bellinger, the agent of the plaintiff, who placed them in an envelope and put them in his grip or satchel, which was then placed in defendant's barn, where it was left while said agent went into defendant's field to assist in properly starting the engine; that upon returning from the field, Bellinger discovered that the check, notes and mortgage were missing from the grip; that the same had not been found up to the hour of the commencement of this action, and that they are lost or stolen, and cannot be found; that the plaintiff had demanded and requested of the defendant the giving of other notes and checks, upon security to the effect that he would not be held responsible for the notes and check so lost; that this action, in short, was brought to reestablish such lost papers, that the plaintiff be declared to be entitled to exercise its option declaring said notes and mortgage due and payable at once, and that it recover the amount due as specified

in the complaint, and that the court fix the amount of security or indemnity, if any, the plaintiff shall furnish the defendant for and on account of said notes, and judgment be entered on account thereof; and prayed for equitable relief.

The defendant, answering generally, denied the allegations of the complaint, and in substance, by way of affirmative defense, alleged that the notes, check and mortgage mentioned in the complaint were delivered conditionally to Bellinger, and were not to be of any force or effect whatever unless the engine did as Bennett, the agent of the respondent, and the appellant agreed it should do before the notes, mortgage and check would be effective; that the engine did not develop the power it was agreed it should before the check, notes and chattel mortgage were to be effective, and that they never did become effective or of any force or value, and that they never were delivered. The second affirmative defense was that another action was pending in the same court between the same parties for the same cause of action, and was still undetermined. The third affirmative defense was a counterclaim or set-off, the defendant claiming that, by breach of the contract upon which the plaintiff sued, he incurred a loss of $150 by reason of the loss of time; that the engine was not worth more than $1,250 at any time, by reason of the insufficiency of its power, and that defendant was damaged thereby in the sum of $1,250; and asked that the same be allowed as a counterclaim to anything that might be recovered in favor of the plaintiff. Thereupon the plaintiff made a motion, requiring the defendant to elect on which one of his defenses he would rely at the trial, on the ground that they were inconsistent. The court made an order granting the motion and requiring the defendant to elect; to which ruling the defendant excepted, and thereupon elected in open court to stand upon its first affirmative defense, which we have mentioned above. The plaintiff filed a reply to this. A jury was demanded by the defendant and refused by the court. The court proceeded to trial of the cause upon the first affirmative defense, and found against the defendant on

all the issues. Judgment was entered, and this appeal is taken, assigning two errors of the court: (1) in granting the motion of respondent to require the appellant to elect upon which one of his defenses he would stand; and (2) in denying the defendant a jury trial.

From a perusal of these pleadings we are forced to the conclusion that the third affirmative defense is inconsistent with the first affirmative defense. It is doubtless true that, under the letter and the spirit of the code, as announced by the court and cited by appellant, there is no classification of answers or defenses as at the common law; that pleas in abatement and at bar may be joined; and that defendant can, and should, unite all the defenses he has in one answer. But all these privileges are subject to the vital requirement that the defenses must not be inconsistent; that is to say, that the establishment of the truth of one defense must not establish the falsity or impossibility of the other. This question was exhaustively examined and discussed by this court in *Seattle Nat. Bank v. Carter*, 13 Wash. 281, 43 Pac. 331, 48 L. R. A. 177, and after an examination and analysis of all the available authorities, it was held that inconsistent defenses were not permissible under the code; that the plaintiff would not be compelled to establish the truth of an allegation in his complaint to which such defenses were set up, and that defenses were inconsistent when one or the other must necessarily be untrue; and this doctrine has never been departed from by this court.

It is true that the doctrine should be applied with caution, and that not all seemingly inconsistent defenses are actually inconsistent; for it is sometimes necessary to make a denial which is in reality a denial of a conclusion of law instead of a fact. For instance, there may be a denial of delivery of certain property because, in the opinion of the pleader, the acts surrounding the circumstances do not constitute a legal delivery, and on that question he has a right to the holding of the court. The same rule applies to a denial of the execution of certain contracts, where it develops that the contract which

defendant signed had afterwards been changed and the defendant denied its execution on the theory that in law it was not the contract which he signed; though in a case of this kind the answer is not logical under the provisions of the code, and it would be more in harmony with its spirit to simply state the facts under which the document in question was signed, and if the facts stated constitute a defense, of course the court will construe the answer to be a denial of the allegation of execution. But in all cases of this kind, and especially cases from this court, will be found the qualifying demand that there shall be no direct contradiction in the facts pleaded. The object of a lawsuit is to elicit the truth concerning the facts which are the subject of the controversy, and the object of pleadings is to aid in such elicitation and determination. But such consummation cannot possibly be aided by pleadings of this kind. On the other hand, the result will be to embarrass and hinder the proper administration of justice. So that the crucial question in this case is, Were these affirmative defenses so inconsistent that the facts stated in one must necessarily be false if the facts stated in the other are accepted as true? If it is true that the notes and check were not executed or delivered under the contract set forth in the complaint, that there was no such contract entered into at all, but that, on the other hand, the contract was simply an agreement to try out the machine and to enter into a future contract if it proved satisfactory, which was, in substance, the first affirmative defense, together with the allegation that it did not prove satisfactory and did not meet the stipulated requirements, and that no contract was ever entered into, these facts are inconsistent with the statements made in the third affirmative defense, for it is not conceivable that there is any room for a counterclaim growing out of a contract which was never executed and to which the defendant was never a party. This is, in reality, a partial defense, and must be based upon something; and if it is based upon anything, it is upon the fact denied in the answer, viz., that the notes, check, and mortgage

had ever been delivered or that the contract sued on had ever been executed.

Upon the second proposition, there is a conflict of authority, but we think it is well established that an action of this kind is an equitable action. It was originally exclusively an equitable action; and notwithstanding the encroachment of the law courts by statutory enactments, these have not had the effect, under the great weight of authority, of ousting the equity court of jurisdiction, and the jurisdiction is at least concurrent and exclusive in many jurisdictions. In discussing this proposition, it is said in Pomeroy's Equity Jurisprudence, vol. 2, § 832:

"Able judges have denied that the equitable jurisdiction extends to suits upon non-negotiable instruments and other unsealed contracts, since an action at law could always be maintained, and no indemnity was necessary. The jurisdiction is sustained, however, by the decided weight of authority in suits upon lost non-negotiable instruments and simple contracts, as well as in suits upon negotiable and sealed instruments. The reason seems to be that the remedy at law is not adequate; a court of equity alone can fully protect the defendant by its decree from all liabilities which *may* arise."

In 19 Am. & Eng. Ency. Law (2d ed.), p. 564, after announcing the doctrine that formerly the courts of equity in such cases had exclusive jurisdiction, it is said that:

"Though actions on lost specialties may now be maintained in the courts of common law, equity is not thereby ousted of its ancient jurisdiction, but may still exercise it concurrently with the courts of law."

In this case it will be noticed that this action was for the reestablishment of a check, notes and mortgage, and while there was no judgment of foreclosure on the mortgage, and the plaintiff was satisfied to take personal judgment, the defendant was placed in no worse position by reason of the fact that the plaintiff did not ask for all the relief to which he was entitled under the pleadings. Conceding the concurrent juris-

diction, the plaintiff had a right to select the forum, and no error was committed by the court in this regard.

The judgment is affirmed.

Parker, Mount, and Fullerton, JJ., concur.

[No. 8922. Department Two. March 17, 1911.]

William Malsch *et al.*, *Respondents*, v. May Winfree Waggoner *et al.*, *Appellants*.[1]

Appeal—Review—Harmless Error—Evidence. The erroneous admission of a deed which was no evidence of legal title is harmless, where the court found on other evidence that the grantee was the owner of the premises.

Easements—Prescription—Permissive Use. Permissive use for twenty years of a private way across plaintiff's land to a county road does not establish an easement, where there was another practical route, plaintiff's predecessors having sold to defendant's predecessors a strip of land for the express purpose of giving access to the county road.

Easements—Implied Grants—"Appurtenances." The grant of land with the "appurtenances" does not infer the grant of a right of way leading to the land over an existing road, where there was no existing easement.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered March 3, 1910, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action to enjoin a trespass upon real property. Affirmed.

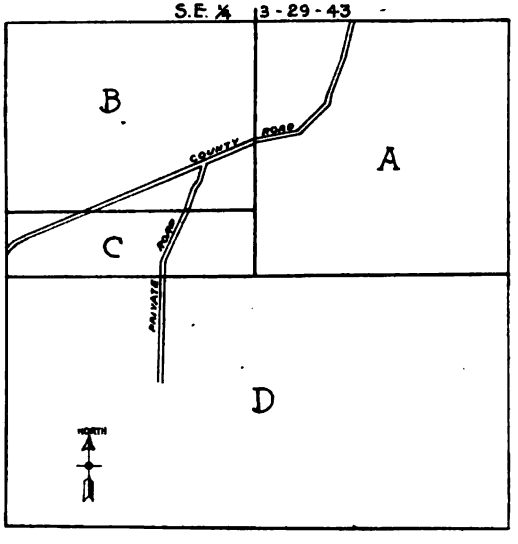
Hoffman & Bailey, for appellants.

Davis & Davis, for respondents.

Crow, J.—The following plat of the southeast quarter of section 13, township 29, north, of range 43, east, W. M., in

[1]Reported in 114 Pac. 446.

Spokane county, will be of material assistance in understanding the issues involved in this action.



Tract A, consisting of forty acres, is the northeast quarter of said southeast quarter of section 13, and tract B is the north thirty acres of the northwest quarter of said southeast quarter of section 13. These two tracts, alleged to be the property of the plaintiffs, William Malsch and Katie Malsch, his wife, will hereinafter be designated as the north lands. Tract C is the south ten acres of the northwest quarter of said southeast quarter of section 13, and tract D, consisting of eighty acres, is the south half of said southeast quarter of section 13. These two tracts belong to the defendants, May Winfree Waggoner and I. N. Waggoner, her husband, and will hereinafter be designated as the south lands. Tracts A, B, and C are intersected and traversed by an established county road, which runs in a generally northeasterly and southwesterly direction as indicated on the plat. Commencing in tract D, crossing tract C, and part of tract B, about as indicated on the plat, is an alleged private road, which, running in a northerly and southerly direction, affords the defendants

a means of ingress and egress to and from their south lands, tracts C and D, across a portion of plaintiffs' tract B, to the county road. The right of the defendants to thus use this private road over plaintiffs' tract B is the controlling issue in this action. For many years a fence was constructed and maintained through tract B along the south side of and parallel to the county road. Bars which could be opened and closed were maintained in this fence at a point where it crossed the line of the north and south private road, and the owners of the south lands, with the permission of the owners of the north lands, passed along the north and south road over a portion of tract B, and through these bars to the county road. Some time in 1908 the plaintiffs erected a fence along the south line of their thirty-acre tract B, which cut off the defendants' access to the county road. The defendants cut this new fence, placed a gate therein, and continued to use the north and south road. This action was commenced to enjoin them from using the gate or trespassing on plaintiffs' land. From a decree in plaintiffs' favor, the defendants have appealed.

The appellants contend that the findings of the trial judge are not sustained by the evidence. We shall not discuss the evidence in connection with this assignment, it being sufficient to now state that, after a consideration of all competent evidence, we approve the findings as made.

The record shows that for some time prior to June 28, 1902, one Jesse L. Grove and Grace Grove, his wife, held title to, and were in possession of, the north lands; that one W. S. Whitney held title to, and was in possession of, the south lands; that on said date Grove and wife sold, and by warranty deed attempted to convey, the north lands to Whitney, from whom respondents derive their equitable title; that by mistake, possibly of the scrivener, the north lands were described as being in the north half of section 13, instead of the north half of the southeast quarter of section 13; that this deed was filed for record on August 30, 1902; that shortly thereafter Grace Grove, one of the grantors, died intestate, leaving two

minor children as her heirs at law; that after her decease the mistake in the description was discovered; that thereupon Jesse L. Grove, her surviving husband, took the original deed to the notary public who had drawn it, and had taken the acknowledgment, and caused him to correct the description to correspond with the actual intention of the parties; that the corrected deed, without any further acknowledgment, was again filed for record on September 18, 1902, at the request of W. S. Whitney, the grantee, and was duly recorded.

During the progress of the trial the respondents offered in evidence as their exhibit one, a certified copy of this deed as corrected and recorded the second time. To its introduction appellants objected, for the reason that such certified copy disclosed the fact that the deed had been twice recorded, and that no new acknowledgment had been taken after the first record, and prior to the second. This objection was overruled. Thereafter appellants introduced in evidence a certified copy of the deed as originally drawn and recorded, and moved the trial court to strike respondents' exhibit one. This motion was denied, and appellants now predicate error upon the admission of respondents' exhibit one, and the later refusal of the trial court to strike the same. In support of these assignments appellants, citing many authorities, enter upon an elaborate discussion of the legal effect of the certified copy of the corrected deed as evidence of title, no new acknowledgment having been taken. We regard this discussion as immaterial, and conclude that no prejudicial error was committed in admitting the deed. The trial court found:

"That on July 28, 1902, Jesse L. Grove and Grace Grove, his wife, the then owners, sold to W. S. Whitney the NE. ¼ and north 30 acres of the NW. ¼, all of SE. ¼ of section 13, township 29, range 43 E. W. M. and executed a warranty deed wherein said lands were incorrectly described as 'The north half (N. ½) of section thirteen (13), township twenty-nine (29), range forty-three (43)' the intention of the grantors by the said instrument was to convey the north half (N. ½) of the southeast (SE¼) of said section thirteen (13); this

deed was filed for record in the office of the auditor of Spokane county on August 30, 1902, at 12:30 p. m. and was recorded in Book 132 of deeds, at page 260; thereafter and after the death of Grace Grove, the wife of the said Jesse L. Grove, who left surviving her her husband and two minor children, it was discovered that the lands intended to be conveyed, were therein incorrectly described and on December 5, 1902, the said Jesse L. Grove, grantor went to Henry W. McNamar, a notary public before whom the acknowledgment of the said instrument was taken and the said Grove requested him to correct the said instrument so as to conform to the intent of the parties and thereupon the said notary public inserted in the said instrument the words "Of S. E. ¼" so that the description read, 'N. 2 of S. E. ¼ of sec. thirteen (13) town. 29, range 43, east, in Spokane county, Washington,' and thereupon the said deed was afterwards re-delivered to said Whitney and was re-recorded."

It is evident that the certified copy of the corrected deed was admitted by the trial judge, not as evidence of the legal title, but merely for the purpose of showing all circumstances attending the transfer of possession, and the mutual intention of the parties, as to the lands sold and sought to be conveyed. Whitney, the grantee, undoubtedly purchased the north lands from Grove and wife, for a valuable consideration of $1,200, recited in the original deed, and also in the corrected deed. Jesse L. Grove, one of the grantors, testified that he and his wife had sold the north lands to Whitney and attempted and intended to convey the same by the deed in question. On September 17, 1906, Whitney sold and conveyed the north lands to the respondents, by warranty deed reciting a consideration of $1,600, and respondents for a long time prior to the commencement of this action were in exclusive, adverse, and peaceable possession of the north lands, claiming title thereto under these identical deeds. The lower court found the respondents had possession and that they owned the equitable title. The evidence was sufficient to sustain this finding without any reference to the certified copy of which appellants complain. No prejudicial error was therefore committed by its admission,

even though it be conceded that, as contended by appellants, it was not evidence of legal title.

Appellants further contend that the north and south private road, being the road in dispute herein, has for about twenty years been continuously used as a means of ingress and egress to and from the south lands by themselves and their predecessors in interest; that their south lands, as they express it, are land-locked, and that they have no other practicable means of ingress or egress. These contentions are not supported by the evidence. Originally Jesse L. Grove and wife owned, not only tracts A and B, but also the ten-acre tract C. At that time Whitney, who was related to them, owned tract D. Grove and wife conveyed to Whitney the ten-acre tract C, for the express purpose of giving him access to the county road, which it will be observed from the plat, passes through the northwest portion of tract C. Afterwards Whitney purchased the north lands from Grove and wife, receiving the deed which by mistake contained the incorrect description. Thereafter appellants, by mesne conveyances, deraigned their title to the south lands from Whitney while he still held the north lands, and later the respondents deraigned their possession and equitable title to the north lands from Whitney. It will be observed that the county road passes through the ten-acre tract C, which Whitney first obtained from Grove, and which appellants now own. Appellants contend that a road cannot be constructed to the county road entirely upon this tract C, but the evidence does not sustain this contention. They further insist that, after Grove and wife conveyed tract C to Whitney, he, Whitney, and his grantees continued to use the old road. This is conceded, but the evidence discloses that such use was permissive only, and that a letter written by the appellant I. N. Waggoner to the respondent William Malsch, prior to the commencement of this action, clearly shows that Waggoner himself so regarded it.

Appellants further insist that they are entitled to an ease-

ment upon the private road across tract B to the county road. In their reply brief they say:

"The only easement we contend for in this case is an implied one. . . We do not now, or never did, claim that this was a highway or that the use of said 'North and South' road was by license, and that a parol license was irrevocable."

In support of their contention they cite the fact that, when Whitney sold the south land, including tract C, to their predecessors in interest, he owned or claimed to own the north lands, and insist that if he did then own the north lands, that fact, coupled with the absence of any practicable way of ingress to or egress from the south lands, established an implied grant by Whitney of an easement over tract B as an appurtenance to the south lands, and in support of such contention cite the following from 14 Cyc., at page 1166:

"Upon the principle of construction that where a man grants a thing he grants with it everything necessary to its enjoyment, it is held that by a grant of land easements necessary for its enjoyment are created *ex necessitate* and pass by the grant, although not expressly named. The rule of the common law upon this subject is that where the owner of two heritages or of one heritage consisting of several parts has arranged and adapted these, so that one derives a benefit or advantage from the other of a continuous and obvious character, and he sells one of them without making mention of those incidental advantages or burdens of one in respect to the other, there is in the silence of the parties an implied understanding and agreement that these advantages and burdens respectively shall continue as before the separation of the title."

There was, however, no necessity for the implied easement for which appellants contend. The evidence disclosed that the way had never been used adversely, that the use had been permissive only, and that there is another possible and practicable way from the south lands to the county road entirely within tract C, which can be used without crossing tract B.

"A grant of a right of way cannot be inferred merely from the fact that there is a way leading to the premises purchased,

even though the grant of land be with all privileges and appurtenances, for the use of the word 'appurtenances,' although appropriate in the conveyance of an existing easement, is not sufficient to create one where none exists." 14 Cyc. 1170.

"No implication of a grant of a right of way can arise from proof that the land granted cannot be conveniently occupied without it. Its foundation rests in necessity not in convenience. It follows that a party cannot have a way of necessity through the land of another when the necessary way to the highway can be obtained through his own land, however convenient and useful another way might be." 14 Cyc. 1173.

This equitable cause is before us for trial *de novo*, and upon the entire record we conclude no prejudicial error has been committed, and that the judgment of the trial court should be affirmed. It is so ordered.

DUNBAR, C. J., MORRIS, and CHADWICK, JJ., concur.

[No. 9260. Department Two. March 18, 1911.]

T. J. MURRAY *et al.*, *Respondents*, v. THOMAS SANDERSON, *Appellant*.[1]

CANCELLATION OF INSTRUMENTS—GROUNDS—MISTAKE—UNILATERAL MISTAKE. Equity will afford relief by the cancellation of an option on the mistake of only one party as to its meaning, where his manifest intent was to grant an option limited to one year for the purpose of perfecting title, the agreement as drawn failed to express the agreement intended, and after three years the title was not perfected and might never be, and the other party could be placed in his former position without working any injustice.

Appeal from a judgment of the superior court for Okanogan county, Taylor, J., entered July 14, 1910, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action for equitable relief. Affirmed.

[1]Reported in 114 Pac. 424.

Howard Waterman, for appellant.

Geo. S. Lee and *Martin & Barrows*, for respondents.

MORRIS, J.—Suit in equity to cancel an option to purchase real estate, upon the ground of mistake. The option was given October 4, 1907, covering agricultural lands in Okanogan county. The consideration was $250, and it was in effect provided that the appellant should have the right to purchase the lands—some one hundred and fifty acres—at $125 per acre, including the water rights appurtenant to the land, at any time during the life of the option. The water rights to the land had never been established by any decree of appropriation, and in order to perfect this right, the respondents agreed to institute legal proceedings whereby such right might be adjudicated and acquired; the option providing that:

"This option is to run for ninety days . . . and it is agreed by said first parties [respondents] that they will have the title to said land and the title to one hundred and twenty-five (125) acres of water from Loop Loop creek for irrigating said land perfected within ninety days from date . . . and in case the title to said land and water is not perfected within said ninety days then it is understood that this option shall extend until such time as the title to said land and water is perfected and it is understood that said first parties will without delay proceed to get a final decree . . . adjudicating how much of a water right for irrigation from Loop Loop creek there is belonging to said land, and what the status of the same is."

It was then provided that, this decree of appropriation having been obtained, appellant was to have a reasonable time to examine the title before concluding his option, and "in case the said parties of the first part fail to perfect said title to said land and to one hundred and twenty-five acres of water for irrigation thereon as aforesaid within one year from date, that said second party may throw up this option," receive back his $250, and be released. The mistake alleged con-

sisted in the failure of the scrivener to limit the option to the period of one year, and to absolutely fix that time as its life. The mistake was denied by the appellant, and issue being joined, the court made findings supporting respondents' theory, and entered a decree of cancellation, and appellant brings the case here.

There can be no question, from a reading of the evidence, that, so far as respondents were concerned, they intended to, and until after the expiration of the year believed they had, limited the life of the option to one year. The only necessity for time was the procurement of a decree establishing the water rights to the land. They were advised by an attorney who drew up the option that this could be done within ninety days, ordinarily, but that it was possible delays might arise which would prevent a final adjudication within that time; but in no event could it be delayed longer than one year. Under this understanding, they fixed the life of the option primarily at ninety days, and inserted the provisions with regard to the proceedings to obtain the water rights and granting the privilege to appellant, in case the water rights were not obtained within one year, he might withdraw therefrom.

From the testimony of respondents it cannot be doubted that they believed that this last provision meant the option should of itself terminate at the end of one year, instead of only at the election of appellant. The attorney who drew up the option says, in regard to this feature, "that one year had been talked about from beginning to end;" and so confident was he that such was the intent of the parties that, although a friend of the appellant of long standing and through whose instrumentality appellant entered into the option, he, when he learned after the expiration of the year that appellant insisted upon holding the option, advised him that respondents could end the option at any time by paying back the $250. Upon entering into the option, respondents at once employed an attorney to obtain an appropriation of

the water of Loop Loop creek for the benefit of this land, when it was discovered that certain Indians claimed rights to these waters, and that, in order to determine the validity and extent of any appropriation of the waters of this creek, these Indians must be made parties and their rights determined, involving proceedings in the Federal courts and before the department of the interior. Other obstacles arose, one of the principal Indian holders died; so that at the end of the year the parties were no nearer to an adjudication of their water rights than they were before, and at this time, three and a half years from the making of the option, the water rights are still undetermined, and there is nothing in the record to indicate when they will be.

The lower court made a finding that, under the circumstances, "it is probable that a decree could never be obtained finally adjudicating the ownership of the waters of said creek." While we would not care to go as far as this, it is nevertheless apparent that it will mean long and tedious proceedings in the Federal courts and before other departments of the Federal government before there would be a final adjudication of the rights of these lands to the waters of Loop Loop creek. So impressed was respondents' attorney, in the water right case but not in this, with the difficulties attending this endeavor, that he advised appellant, before this action was brought, that "they had not been able to clear up the water right, and it was impossible to do so. It was a mistake to begin with." We think these facts bring the case properly within the circumstances under which a court of equity will cancel an instrument for a mistake of one party alone, assuming now that appellant at all times understood the contract to be intended as it now reads, and that the year provision was for his benefit alone.

It is an unquestioned principle of equity that, when an instrument is drawn and executed intending to carry into effect an agreement already entered into, but on account of mistake of the draftsman, or his failure to appreciate or understand

the contract as intended, or from some other cause, the instrument which is intended to express the agreement is insufficient for that purpose, and the manifest intention of the parties is not fulfilled, equity will, under such circumstances, afford adequate relief; because the execution of agreements fairly and legally made is a peculiar branch of equity jurisdiction, and an instrument intended to execute an agreement, which for any reason fails to embody the true agreement, remains as much unexecuted as though one of the parties had refused altogether to comply with it. *Hunt v. Rousmaniere*, 1 Pet. 1; *Walden v. Skinner*, 101 U. S. 577, 583; *Dennis v. Northern Pac. R. Co.*, 20 Wash. 320, 55 Pac. 210. It cannot be doubted, it is said in *Williams v. United States*, 138 U. S. at page 517, that inadvertence and mistake, equally with fraud and wrong, are grounds for judicial interference. *Dietrich v. Hutchinson*, 73 Vt. 134, 50 Atl. 810, 87 Am. St. 698. And while there are many cases holding that, in general, for the mistake of one party to an instrument only, a reformation will not be afforded so as to subject the other party to obligations and conditions to which he never assented, or to bind him to what he never contracted; yet when the parties can be placed in their former positions, and the mistake is clearly established and convincingly shown, the instrument will be cancelled or rescinded for the mistake of one only of the parties. *Benson v. Markoe*, 37 Minn. 30, 33 N. W. 38, 5 Am. St. 816; *Dulany v. Rogers*, 50 Md. 524; *Hearne v. Marine Ins. Co.*, 20 Wall. 488; *Conlan v. Sullivan*, 110 Cal. 624, 42 Pac. 1081; *Diman v. Providence, W. & B. R. Co.*, 5 R. I. 130.

Fehlberg v. Cosine, 16 R. I. 162, 13 Atl. 110, thus states the rule:

"Where there has been a material mistake upon one side the court may rescind and cancel the agreement, where it can do so without injustice to the other party. There are two principal classes of cases in which this power of the court is exercised. One includes cases of executory contracts and

the like, where the parties can be put *in statu quo*. In these cases the parties have not, in reality, agreed; their minds have not met; and if one, without fault on his part, has bound himself to something materially different from what he supposed it to be, which can be annulled without loss or injustice to the other side, it is deemed to be inequitable to enforce it."

It seems to us the case before us falls within these equitable principles. Respondents believed they were giving an option that would expire within one year. They promptly endeavored to obtain an adjudication of their water rights, but unforseen obstacles prevented such ascertainment within the ninety days first fixed as the required period, or within the year supposed to be ample to overcome all obstacles. Over three years have elapsed since this option was given. Appellant has not seen fit to exercise it, nor do we know that he ever will. He has lost nothing by the delay. If he surrenders his option, voluntarily or involuntarily, he is by its terms to receive back his $250; while respondents have had their lands tied up for three years, and unless they be granted the relief prayed for, may have them indefinitely tied up, a hardship against which it is the peculiar province of equity to grant relief, where by doing so no wrong can be inflicted upon appellant, who by his conduct has shown he will not purchase the lands until the water rights can be finally adjusted to his satisfaction, a condition that may never happen. Appellant can be placed in *statu quo* by a cancellation of the option, and in the meantime he has had its benefit. No injustice nor hardship will come to him because of its cancellation; while not to do so is to take from respondents the opportunity to sell their lands to others who might not be so insistent upon the adjudication of water rights, and who might be content to hold and occupy them as respondents have without such adjudication.

For these reasons, we approve of the conclusion of the court below that respondents are entitled to the relief prayed for, and the judgment is affirmed.

Dunbar, C. J., Crow, and Chadwick, JJ., concur.

[No. 9188. Department Two. March 20, 1911.]

O. S. SAMPSON *et al.*, *Appellants*, v. S. C. WOLDENBERG *et al.*, *Respondents*.[1]

INJUNCTION—BOND—ACTION—PARTIES ENTITLED TO SUE. An action upon an injunction bond may be maintained by the obligees in their individual capacity, where the injunction was issued in a suit against them as mayor and councilmen of a town to prevent them from entering into a contract on behalf of the town, the town was not made a party to the suit, the injunction ran against them in their individual capacity, and the bond named the obligees as individuals and provided for the payment of damages and costs by them, not by the town.

Appeal from a judgment of the superior court for Chelan county, Grimshaw, J., entered May 7, 1910, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action on an injunction bond. Reversed.

Reeves & Reeves, for appellants, cited: 7 Cyc. 563; *McLain v. Onstott*, 3 Ark. 478; *Chadsey v. McCreery*, 27 Ill. 253; *Van Buskirk v. Day*, 32 Ill. 260; *Thompson v. Weaver*, 7 Blackf. (Ind.) 552; *Davis v. Garr*, 6 N. Y. 124; *Reznor v. Webb*, 36 How. Pr. (N. Y.) 353; *Horah v. Long*, 20 N. C. 274; *Harney v. Dutcher*, 15 Mo. 89, 55 Am. Dec. 131; *Sims v. Boynton*, 32 Ala. 353, 70 Am. Dec. 540; *Lyons v. Doherty*, 50 Mo. 38; *Roberts v. Pierce*, 79 Ill. 378; *Breeze v. Haley*, 13 Colo. App. 438, 59 Pac. 333; *Hecker v. Cook*, 20 Colo. App. 282, 78 Pac. 311; *Moulton v. McLean*, 5 Colo. App. 454, 39 Pac. 78; *Nimocks v. Welles*, 42 Kan. 39, 21 Pac. 787; *Ayres v. Toland*, 7 Har. & J. (Md.) 3; *Jeffries v. McLean*, 12 Mo. 538; *Cheltenham Fire-Brick Co. v. Cook*, 44 Mo. 29; *Henricus v. Englert*, 137 N. Y. 488, 33 N. E. 550; *Waddell v. Moore*, 24 N. C. 261; *Crawford v. Stewart*, 38 Pa. St. 34.

L. J. Nelson and *Parr & Hubbard*, for respondents.

[1]Reported in 114 Pac. 162.

Morris, J.—Appeal from a judgment denying liability upon an injunction bond. In December, 1908, the appellants were mayor and councilmen of the town of Leavenworth. The three councilmen were appointed by the mayor as a committee to enter into a contract on behalf of the town with W. J. Moon, to build a sidewalk. After the making of the contract and when it was practically completed, respondent Woldenberg, who was also a councilman, obtained an injunction against the appellants and Moon from further proceeding with the work, or paying for the same with town funds, the remaining respondents joining with Woldenberg in the execution of the injunction bond. An appeal was taken to this court from the injunction order, and the same was reversed. *Woldenberg v. Sampson*, 55 Wash. 152, 104 Pac. 184. Appellants thereupon brought this action upon the injunction bond, in which they were defeated, the court holding that the injunction order and bond ran against and in favor of appellants only in their representative capacity as officials of the town of Leavenworth; and as they here sued individually, they could not recover. The action was dismissed as to Moon, he having testified that he had no present interest in the controversy.

The only question that need be considered is the ability of appellants to maintain this action, suing as individuals. An examination of the authorities discloses that, upon the point here involved, there is a conflict of authority. It will be found, however, that in most cases the decision is influenced by the character of the act enjoined and the language of the bond, and that no rule can be relied upon, that will harmonize with all the cases, which eliminates the particular facts involved in each case. In the complaint in the injunction suit, appellants were named as O. S. Sampson as mayor, and the other appellants as councilmen, of the town of Leavenworth. The prohibitive part of the injunction entered against them was:

"It is therefore ordered and considered by the court that

the defendants O. S. Sampson, R. S. King, J. C. Ruth, and H. X. Featherstone and each of them be and they hereby are prohibited and restrained during the pendency of this action from paying out of the funds of the town of Leavenworth."

In the bond the same caption was used, but the bounden part was: "are held and firmly bound unto the above named defendants O. S. Sampson, R. S. King, J. C. Ruth, H. X. Featherstone and W. J. Moon." It appears that, when the injunction suit was started, the town, not being made a party to the action, interposed no defense, and the proceedings in the court below and in this court upon appeal were conducted on behalf of the town by appellants, who employed attorneys and paid all necessary costs and expenses of the litigation. The town of Leavenworth, not being a party to the injunction suit, was in no manner bound thereby; as to it, the restraining order was of no force or effect. The only persons restrained were O. S. Sampson, R. S. King, J. C. Ruth, and H. X. Featherstone. The act which they were forbidden to do was one they would have done only by virtue of their official relation to the town; and while they were named defendants in the title or caption of the restraining order as mayor and councilmen, yet it was as individuals that they were forbidden to act in further carrying on the contract entered into between them, as the committee of the town, and Moon. Had they violated this order, no proceedings could have been taken against the town. They would have had to respond to any attempted violation in their own proper persons. They were, as individuals, restrained from acting as mayor and councilmen in this particular instance. The town itself could act through other officers or councilmen, and in no way subject itself or the officials through whom it might act. Or they could have resigned their official positions and their successors could have performed the acts they were forbidden to do. It was only the individual act of these appellants that was in any manner affected by the injunction order. In fact, this seems to have been conceded by the court

and the plaintiffs in the injunction suit, for we find an order entered, five days after the original restraining order and bond had been filed, in which it is recited that, "upon agreement between the court and counsel for plaintiffs, it is ordered that said temporary injunction be and it is hereby modified to bind the plaintiff S. C. Woldenberg and the defendants councilmen and mayor of the town of Leavenworth, as such councilmen and mayor." Appellants were the only obligees in the bond, and as such were named as individuals. The fact that they were further described as "the above named defendants" added nothing to the obligation. They were, as individuals, enjoined from acting in behalf of the town, and the bond obligated itself to the payment of damages and costs sustained by them—not by the town—in being so prevented from acting, or in case such injunction order was vacated. The respondents, having prevented appellants from, as individuals, performing their official duty in the premises, cannot now be heard to say that as individuals they were not justified in defending their official acts, and incurring costs within the contemplation of the bond.

In *Hyatt v. Washington*, 20 Ind. App. 148, 67 Am. St. 248, relied upon by respondents, the obligees were named in the bond "as mayor of the city of Washington" and "as marshal of the city of Washington," and it was held they could not sue as individuals. The appellants are not so named here, but rather as "the above named defendants O. S. Sampson, R. T. King, J. C. Ruth, H. X. Featherstone, and W. J. Moon." Respondents also cite *Kinkead v. Benton*, 19 Nev. 437, 14 Pac. 294, in which the governor, comptroller, and treasurer of the state of Nevada were enjoined from exercising the authority conferred upon them by law in directing the construction of an insane asylum. The individuals named as such officials, upon the dissolution of the injunction, brought an action on the bond as individuals, and it was held they could not recover, as the bond only ran to them in their official capacity. We do not think these cases, or other

like cases, are authoritative, where, as here, the bond does not run to the officials as officials, but to them as individuals. Cases more nearly in point with the present situation are: *Breeze v. Haley*, 13 Colo. 438, 59 Pac. 333, and *Littleton v. Burgess*, 16 Wyo. 58, 91 Pac. 832, 16 L. R. A. (N. S.) 49.

We are of the opinion that the appellants could rightfully maintain action on this bond, and the court should have so held. Without discussing the dismissal as to Moon any further than to say that, under the findings, we see no reason for a dismissal as to him, it is ordered that the judgment be reversed, and the cause remanded for further proceedings.

DUNBAR, C. J., CHADWICK, and CROW, JJ., concur.

[No. 9281. Department Two. March 22, 1911.]

WILLIAM G. MALLOY *et al.*, *Appellants*, v. INTERSTATE IRRIGATION COMPANY, *Respondent*.[1]

BROKERS—COMMISSIONS—CONTRACTS—CONSTRUCTION. A broker's commissions are payable out of the proceeds of the sale, and not unconditionally at the time deferred payments of the purchase price are made, where the contract provided that one-half of the total commissions shall be deducted from the first payment, the balance to run according to the terms of the sale contracts, that is, divided into as many payments as the contracts call for; especially where the parties at first so construed it and acted accordingly for some time.

SAME. In such a case, proportionate commissions are properly allowed upon partial payments received in compromise of cancelled contracts.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered December 18, 1909, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, in an action on contract. Affirmed.

[1]Reported in 114 Pac. 167.

Post, Avery & Higgins, for appellants.

H. M. Stephens, for respondent.

PER CURIAM.—In August, 1906, the respondent acquired title to a large tract of land in Kootenai county, Idaho, which it proposed to plat and sell in small tracts. Appellants Malloy became the exclusive agents for one year, under a contract the material parts of which follow:

"(2) Said second parties are to sell the lands at a price not to exceed $150 per acre and at whatever price under that amount which they may see fit, provided, the company receives on each and every acre a net price of not less than $100 per acre where sales are made at $125, and a net price of $125 where sales are made at $150. In other words, said first party authorizes the second parties to sell this land at a divided price of $125, and $150 per acre and of any tracts which are sold at $125 per acre or less, said first party shall receive a net price of $100 per acre. In the event of the second parties selling the lands at a price to exceed $125 per acre, said first party shall receive a net price of $125 per acre. First party reserves the privilege, and it is optional with them at any time, to advance the net price of any of their lands, and the said second parties must govern the sale price according to advances which might be made by first party. It is understood and agreed by both parties that second parties shall not hold the lands at a net price which would allow them more than $25 per acre as a commission.

"(3) It is understood by both parties that second parties may sell the lands upon a cash payment of one-fourth of the total purchase price and the deferred payments to be divided into three equal annual payments with interest at 7% per annum. These terms of sale, however, can be changed at the option of the first party upon a written notice to second parties of at least two weeks in advance of the date at which they desire to make different prices or terms.

"(4) It is also understood and agreed that first party shall use contracts covering whatever sales might be made by second parties; and in said contracts the total purchase price of the land described in contract shall be shown and from whatever amount constitutes first payment on said contract or contracts, one-half of the total commissions made on

the sale by second parties will be deducted and held by second parties and the balance of the commissions due on said sales shall run according to the terms of the contract, that is, if the contract calls for three annual payments, the deferred commissions due second parties shall be divided into as many payments as the contracts call for, and the first party shall, whenever desired by second parties, give in writing to said second parties an acknowledgment of whatever commissions are due on deferred payments called for in contracts issued by said first party."

The land contract agreed upon by the parties was, with such modifications as the character of the transaction demanded, the usual executory contract of sale or option agreement. The parties operated under this contract until about November, 1907, when the books of the agents having been experted, the relations of the parties were terminated, the Malloys executing a note for $12,500 to cover payments made to them on account of land contracts. This note was thereafter assigned to the Exchange National Bank. The note carried, as collateral to the principal engagement, accruing commissions due the Malloys on the contracts of sale which were issued by them. One-half of the commission was retained by the agents out of the first payments on the contract. After the lapse of sufficient time to mature other payments, some of the contracts were cancelled, partial payments were accepted on others, and on some, differences arising between respondent and its vendees were arbitrated, so that the purchasers were deeded an amount of land equal in value to the first payment. The Malloys were also owing to respondent a sum not included in the note above mentioned, and after the business had been taken over by respondent, it applied on this account an amount equal to their commission on each deferred payment as it was received, until the account was satisfied; and thereafter, and in the same manner, such sums were paid to the bank for credit on the note. When a partial payment was made, no credit was carried to the account or note until the full amount of the payment came in. No credits for

commission were allowed on cancelled or on compromised contracts. This method of the respondent was pursued without challenge until June 2, 1908, when the Malloys by letter informed respondent that, under their construction of the contract, they were entitled to the full amount of their commission or an amount equal to their commissions at the due dates, their position being most tersely stated by their counsel as follows:

"In other words, that the question of defendant's receiving such payment is immaterial in determining when the commission shall be paid to the plaintiffs, but that the commission on each sale is due at the time when the payments on account thereof are due as in the original contracts written, and nothing done thereafter by the defendant, or the purchaser, can in any way affect the due date of the commissions, or the amount thereof."

Aside from the conduct of the parties, to which it is always proper to refer when construing doubtful or ambiguous contracts (*Nelson v. Western Steam Nav. Co.*, 52 Wash. 177, 100 Pac. 325), we can agree with the lower court that the contract itself makes it plain that it was the intent of the parties that the commissions were to be paid out of the moneys paid in by the vendees, and was not an engagement to pay in any event. The agency contract, as well as the contracts of sale, they being merely executory in their character and providing for cancellation, would indicate that it was within the contemplation of the parties that the vendees might default leaving the property on the hands of the respondent. This conclusion relieves respondent of the burden of bearing the rule invoked by appellants that their contract was performed when they produced a purchaser who was ready, able, and willing to buy on the terms prescribed by the vendor. The rule undoubtedly is that, where a satisfactory contract is made through the effort of a broker, his right to a commission cannot be denied or affected in any way by any modification of the contract between the

seller and the buyer, in the absence of any provision in the contract to the contrary. But it is equally well settled that, where the parties have contracted the manner and time of payment of a commission on a real estate contract, the contract will control without resorting to the general rule.

Some weight is attached by appellants to those words in the contract "deferred commissions due," etc., it being insisted that these words indicate that the balance of the commission, after deducting the first half from the down payment, became payable when the deferred payment became due. But we cannot take a few words or even a single clause of the contract, but are bound to look to the whole of it. If the words be given the full weight contended for by appellants, we are met by another clause which seems to provide that it was the first intent of the parties that respondent should receive a net price for the land. When considered together, these provisions make the construction placed upon the contract by appellants arbitrary and unreasonable.

At the close of the plaintiffs' case a motion was made for judgment. The trial court held that the contract was plain and needed no construction, but suggested that there would be a proportionate amount of commissions due upon partial payments and sums received in compromise of cancelled or arbitrated contracts, and suggested that the question might be left to a bookkeeper. The motion for judgment was withdrawn, the attorney for respondent indicating his purpose to supply evidence which would make the items clear. Considerable evidence was taken to show the transaction and conduct of the parties, but we find nothing in the statement of facts to verify the amount found by the court, which was $333.70. Assuming, however, that this finding was made after reference to the books and accounts of the company, the judgment is affirmed.

[No. 8911. Department One. March 22, 1911.]

W. H. ABEL, *Appellant* v. HOGAN HANSEN *et al.*, *Respondents*.[1]

ATTORNEY AND CLIENT—COMPENSATION—CONTRACT—LIABILITY—CONSTRUCTION. Where one of the heirs interested in property knows of and sanctions the employment of an attorney on behalf of all the heirs to recover the property, she is liable for her share of the reasonable value of his services and disbursements, but not for the amount agreed to be paid him, where she had no knowledge of the particular contract under which he was employed.

SAME. An heir interested who made a contract on behalf of co-heirs employing an attorney to represent all the heirs in recovering property, is not liable on the contract for more than his proportionate share, in case the contract is repudiated by the other heirs; especially where that would be contrary to the intent as evidenced by the fact that he would be liable for more than the value of his interest in the property.

Appeal from a judgment of the superior court for Chehalis county, Sheeks, J., entered April 9, 1910, in favor of the defendants, after a trial on the merits before the court without a jury, in an action on contract. Reversed.

A. M. Abel and *W. H. Abel*, for appellant.

J. A. Hutcheson, for respondents.

PER CURIAM.—The appellant, an attorney at law, brought this action against the respondents to recover for professional services. The record discloses that some time in the year 1890, one Christopher Hansen settled upon certain unsurveyed land situated in Chehalis county, intending to enter the same under the homestead laws of the United States as soon as they should be surveyed and become subject to entry. He continued to reside thereon until 1893, when he died, this time being prior to the time the lands became subject to entry. He left, as his heirs at law, the respondents above named. The surveys were extended over the land and the

[1]Reported in 114 Pac. 182.

land became subject to entry during the latter part of the year 1893, when it was discovered that the land fell in section thirty-six, a section that would have been reserved as school land had it been vacant at the time the surveys were extended over it. The portion settled upon, however, was subject to entry by Hansen's heirs, but they did not attempt to avail themselves of the opportunity until after the time fixed by law for such entry had expired. Subsequently they offered filings which were rejected. Later on they renewed their offer, filing therewith affidavits tending to show an excuse for failing to offer filings within the ninety days limited by law. This offer was likewise rejected. Between this time and 1903 other attempts were made by one of the heirs to have the case opened, which were likewise unavailing.

In 1905, with the matter in this condition, the respondent Hogan Hansen entered into a written contract with appellant, by which he agreed to pay appellant a fee equal to one-half the value of the land at the time patent issued, if he would take up the case for the heirs and succeed in obtaining a patent for the land. The appellant entered upon the employment, and later on succeeded in having the case reopened and the filing of the heirs allowed. Final proof was made thereon in 1907, and a final receiver's receipt issued at the same time on behalf of the heirs for the land. From the ruling allowing the entry, the state of Washington appealed to the commissioner of the general land office. A few days later, after the appeal had been taken, another written contract was made between the appellant and Hogan Hansen. This contract was similar to the former one, except that it expressed on its face that it was made on behalf of all of the heirs, and a clause was added providing a manner of ascertaining the appellant's interest in the land. The appeal of the state was decided adversely to it in 1908, and shortly thereafter patent was issued to the land in favor of the respondents. The appellant and Hogan Hansen thereupon sought to ascertain the value of the appellant's interest in the land as provided in the con-

tract last mentioned, and to that end appraisers were appointed who fixed the value of the land at $13,032. The heirs to the estate, other than Hogan Hansen, refused to recognize the contract as obligatory upon them, and the present action was brought to recover thereon.

In his complaint the appellant demanded judgment for one-half the value of the land as found by the arbitrators, and the further sum of $463.25, advances made by him in prosecuting the proceedings before the land department. Prior to the trial of the action in the court below, the appellant made a settlement with the respondents Martin Hansen and Emma Johnson Dounck, and no controversy is made concerning their interests. The respondent Mary Biri, in her answer, denied liability under the contract, but admitted that the appellant's services were beneficial to the heirs, and offered to let judgment go against her for one-fourth of the reasonable value thereof, which amount she alleged to be $250. On the trial the judge awarded appellant one-fourth the value of the land as found by the arbitrators, making it a charge upon the interests of Hogan Hansen in the land, but refused to render any judgment whatever in favor of appellant against Mary Biri. It did, however, award a judgment against Mary Biri for $325, in favor of Hogan Hansen, apparently to reimburse him for the liability incurred by him in prosecuting the proceedings necessary to obtain title to the land. The appellant contended that he was entitled to judgment against Mary Biri for one-fourth of the fee agreed upon in the written contract and her proportionate share of the expenditures made by him in prosecuting the proceedings, or if it be held that she is not liable on the contract, a judgment against Hogan Hansen for such sums. From the refusal of the court to award the appellant the judgment demanded, this appeal is taken.

The appellant seeks to recover on the contract against the respondent Mary Biri on the theory that she sanctioned and approved the contract made between the appellant and Hogan

Hansen, but we are unable to find in the record anything that justifies such a conclusion. She undoubtedly knew of the employment of the appellant by her brother and sanctioned his act in so far as to approve of the appellant's employment, and thus bound herself to pay for his services her proportionate share of the reasonable worth of the services, but we do not find any evidence which justifies the conclusion that she knew of or sanctioned the particular contract entered into between the appellant and Hogan Hansen. We think, however, that the appellant was entitled to judgment against Mary Biri for one-fourth of the reasonable value of his services. This issue was tendered in Mrs. Biri's answer, and after the court adjudged that the appellant was not entitled to judgment on his contract, it should have permitted him to show the reasonable value of his services and render judgment accordingly. The appellant was entitled also to a judgment for one-fourth of the amount of the advances made by him necessary to prosecute the proceedings in the land department.

We cannot, however, agree with the contention that the appellant is entitled to judgment over against the defendant Hogan Hansen for the difference between the amount he will receive from Mary Biri as the reasonable value of his services and the contract price agreed upon. The contract does not in express terms declare that Hogan Hansen shall be responsible for the entire fee in case his co-heirs repudiate the contract, and it seems plain that such could not have been the intent of the parties, as the share agreed to be awarded to the appellant by the terms of the contract was twice the value of Hogan Hansen's interest in the land.

For the error noted, however, the judgment is reversed, and the cause remanded with instructions to enter a judgment in favor of the appellant and against Mary Biri for one-fourth of the reasonable value of the appellant's services in prosecuting the proceedings in the land department, and one-fourth of the advances made by the appellant in that

behalf. Leave is given to each party to take additional testimony if they so desire.

[No. 9124. Department One. March 22, 1911.]

WILLIAM A. PETERS *et al.*, *Respondents*, v. JOHN T. McPHERSON, *Appellant*.[1]

PLEADING—ANSWER—NEGATIVE PREGNANT. A denial in manner and form that plaintiffs expended the specified sum of money alleged by them, in a certain action or at all, is a negative pregnant and insufficient.

PLEADING—ANSWER—GENERAL DENIAL—SUFFICIENCY. A general denial of each and every allegation of a paragraph of a complaint alleging that a certain sum is the reasonable value of plaintiff's services is sufficient to put the same in issue, under Rem. & Bal. Code, § 264 (authorizing either a general or a specific denial), without any specific denial that some lesser sum was due; since a general denial under the code is the equivalent of the general issue.

PLEADING—ANSWER—PLEA OF TENDER—JUDGMENT ON PLEADINGS. A plea of tender does not entitle the defendant to judgment on the pleadings, since the plaintiffs can admit the same without waiving their cause of action.

Appeal from a judgment of the superior court for Kitsap county, Yakey, J., entered March 2, 1910, in favor of the plaintiffs upon the pleadings, in an action on contract. Reversed.

John G. Barnes, for appellant.

Earle & Steinert and *Marion Edwards*, for respondents.

PER CURIAM.—The respondents, who are attorneys at law, brought this action to recover for professional services. Judgment was awarded them upon the pleadings after answer filed, and the sufficiency of the answer to raise an issue is the question presented on this appeal.

[1]Reported in 114 Pac. 188.

That portion of the pleadings material to be considered are the following. In the complaint it was alleged:

"(2) That on or about the 1st day of August, 1904, defendant employed plaintiffs as his attorneys, to defend a certain suit brought against him, entitled Edward F. Sweeney vs. John F. McPherson *et al.* in the superior court of the state of Washington for Kitsap county. That plaintiffs did appear for the defendant and his wife in said suit, and defend the same until its termination and from time to time from the 17th day of August, 1904, until and including the 17th day of October, 1907, they expended divers and sundry sums of money to pay the necessary expenses of the defendant in said suit, amounting in all to the sum of eighty-eight and 15-100 dollars ($88.15), which is itemized in schedule 'A' hereunto annexed.

"(3) That the reasonable value of the plaintiffs' services to the defendant in said suit was three hundred ($300) dollars."

And for a second cause of action plaintiffs allege:

"(2) That on or about the 1st day of August, 1907, that the defendant employed the plaintiffs to prosecute for him a suit against the administratrix of the estate of one Brown, deceased, in the superior court of the state of Washington in and for King county, which the plaintiffs accordingly did until its termination, and in the course thereof expended the sum of four ($4) dollars, for filing the complaint. That the reasonable value of their services in such suit was fifty ($50) dollars."

The answer thereto was as follows:

"(1) Referring to the second paragraph of the first clause of complaint, defendant denies that the plaintiffs expended the sum of eighty-eight dollars and 15-100 to pay the necessary, or other expenses of defendant in said suit, or in any suit whatsoever, or at all.

"(2) He denies each and every of the allegations contained in paragraph 3 of said first cause of complaint.

"(3) Referring to the second paragraph of the second cause of action in said complaint, defendant denies that the reasonable value of the services of plaintiffs in the suit was $50."

And for a further and affirmative defense said defendant alleges:

"(1) That on or about the 25th day of February, 1909, defendant duly tendered to the plaintiffs the sum of two hundred and twelve dollars and ninety-five cents, in payment for the services of plaintiffs, and the money paid out and expended by them, in the suits, matters and things set forth in the first and second cause of action in the complaint herein, said tender being made before the commencement of this action, and the amount being the full amount to which plaintiffs are entitled.

"(2) That the defendant has always been and still is, ready and willing to pay the said sum to plaintiffs, and now brings and pays the same into this court for said plaintiffs."

The trial judge held the answer to be a negative pregnant, and hence insufficient to put the plaintiffs upon their proofs. He granted judgment, however, only after he had proffered the defendant leave to amend, and after the defendant had elected to stand on his answer.

The statute (Rem. & Bal. Code, § 264) provides that an answer, in order to put in issue the allegations of the complaint, must contain a general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief. It is manifest that this section recognizes two forms of denials, each of which traverses the allegations of the complaint to which it is directed; namely, a general denial, which may be either positive or on information and belief, and a specific denial, which likewise may be either positive or on information and belief. These forms are, from their very nature, distinct and opposite, the one may be couched in general language and directed against the several paragraphs of the complaint or to the complaint as a whole, while the other must be specific and controvert each separate allegation of the complaint, those implied from the express allegations as well as the express allegations themselves. And while no forms for these denials are prescribed by the

code, it is the rule, and it is generally so held, that any form of words which clearly and unequivocally traverses the allegations intended to be denied is sufficient for that purpose. But the denials must be clear and unequivocal, hence, it is likewise held that literal and conjunctive denials, denials in manner and form, or any form of denial which fails to deny the averment in the complaint intended to be controverted in its substance and intent, is insufficient to raise an issue.

Applying these rules to the case in hand, it is plain that the attempted denial of the second paragraph of the first cause of action, and the attempted denial of the second paragraph of the second cause of action, are insufficient. They are neither general nor specific denials, but are denials in manner and form, which question the literal truth of the allegations to which they are directed, perhaps, but not their substance nor their effect. But the denial made to the third paragraph of the first cause of action, tested by the same principles, would seem to be sufficient. It denies each and every allegation contained in the paragraph to which it is directed, and is as definite, it would seem, as a general denial could be made. To have followed this denial, as is sometimes done, and seems to have been thought necessary in this case, with the words, "Deny that the services of plaintiffs were of the value of three hundred dollars, or of any value whatsoever," would not be to deny by a general denial, but by both a general and specific denial; a manner of denial not forbidden by the code, but a manner of denial wholly unnecessary. Moreover, the form here followed by the pleader is as definite as that recognized by this court as proper in *Penter v. Staight*, 1 Wash. 365, 25 Pac. 469, and more definite than the denial held sufficient in *Denver v. Spokane Falls*, 7 Wash. 226, 34 Pac. 926. The denial is also in the form recommended as proper and sufficient by the authorities and works on code pleading generally. Sutherland on Code Plead. & Prac., § 408. Also forms No. 102 *et seq.*

The argument generally made against this form of denial

is that it does not negative the idea that some lesser sum than the precise amount alleged is due the plaintiffs for the services performed; that an allegation to the effect that a certain sum is the reasonable value of stated services implies an allegation that each and every part of the sum alleged is likewise the reasonable value of the services, and hence, a general denial must admit the implied allegations, even though it deny those expressly alleged. But clearly this is not sound for many reasons. If it be true that an allegation in a complaint to the effect that a certain sum is the reasonable value of stated services implies an averment that each and every of the parts of such sum are also reasonable, it must be true that a denial which denies each and every allegation in the complaint traverses the implied allegation as well as those that are expressed, for otherwise it is something different from that which it purports to be, it is not a denial of each and every allegation in the complaint, but a denial of a part thereof only. Again, the form of denial is the equivalent of, and the substitute for, the general issue, under the common law system of pleading. Its use was intended to give the defendant the same right to require the plaintiff to establish by proofs all the material facts necessary to show his right to recover as would be required under the plea of the general issue at the common law. At the common law all of the principal actions in common use could be traversed by pleading the general issue. The form for such plea was, of course, not always the same; for example, in assumpsit, the plea was *non assumpsit;* in debt on simple contract, *nil debit;* in debt on bond or other specialty, *non est factum;* in trespass and in trespass on the case, not guilty; but each plea had the same effect—it traversed each and every allegation of the complaint to which it was directed. It left nothing to be assumed. It put in issue the expressed, as well as the implied, allegations of such complaints. Since, therefore, the general denial under the statute is the equivalent of, and the substitute for, the general issue at common law, by anal-

ogy it ought to have the effect of such a plea, and we think such was the purpose of the code.

It seems to us, however, that the strongest argument that can be made in favor of the sufficiency of this form of denial is that it is directly sanctioned by the code. Plainly the code contemplated that every allegation in the complaint, be the same an allegation containing implied averments, or otherwise, could be put in issue by a general denial. This being so, the court should recognize that purpose and give it effect, even though to do so may contravene some previously existing rules of pleading; for power to change the rules of pleading is one of the acknowledged powers of the legislature.

It is said, however, that this court has heretofore laid down a different rule; in fact, both sides find comfort in some of our former decisions, the respondent to sustain the trial court in its entire ruling, and the appellant to support the denials which in this case we hold to be insufficient. It must be confessed that our decisions have not been entirely harmonious on this question. The cases bearing thereon are the following: *Seattle v. Buzby*, 2 Wash. Ter. 25, 3 Pac. 180; *Gammon v. Dyke*, 2 Wash. Ter. 266, 5 Pac. 845; *Dillon v. Spokane County*, 3 Wash. Ter. 498, 17 Pac. 889; *Penter v. Staight*, *supra*; *Hansen v. Doherty*, 1 Wash. 461, 25 Pac. 297; *Proulx v. Stetson & Post Mill Co.*, 6 Wash. 478, 33 Pac. 1067; *Denver v. Spokane Falls*, *supra*; *Seattle Nat. Bank v. Meerwaldt*, 8 Wash. 630, 36 Pac. 763; *Columbia Nat. Bank v. Western Iron & Steel Co.*, 14 Wash. 162, 44 Pac. 145; *Cole v. Noerdlinger*, 22 Wash. 51, 60 Pac. 57; *O'Brien v. Seattle Ice Co.*, 43 Wash. 217, 86 Pac. 399.

We shall not stop to specially review all of those cases. In most of them where the denials have been held not to raise an issue, they were plainly denials in manner and form, being neither general nor special. It is worthy of notice, however, that in *Dillon v. Spokane County*, *supra*, the territorial court made the distinction we have sought to make here. The court, after remarking that certain of the denials failed

to raise an issue because they were denials in manner and form and insufficient, held that the denial to the seventh paragraph of the complaint was sufficient because, as the court stated, it was "denied by a general denial," the seventh paragraph being to the effect that the defendant had collected certain sums of money belonging to the county of Spokane for which he had failed to account.

The cases that can be said to be contrary to the rule we now announce are *Columbia Nat. Bank v. Western Iron & Steel Co.*, and *Cole v. Noerdlinger*, *supra*. The first of these cases was a suit upon a promissory note. The answer admitted the execution of the note, but denied by a general denial an allegation in the complaint to the effect that the same had not been paid and was wholly due. The decision was rested on two grounds: first, that the allegation was immaterial, and hence, need not be proved even if sufficiently denied, on the principle that payment is an affirmative defense which must be pleaded; and second, that the answer in itself was a negative pregnant. The reason why the court considered the answer a negative pregnant is not stated in the opinion, but it was probably thought that the denial was equivalent only to a denial in manner and form. The case of *Cole v. Noerdlinger*, is not quite the same, as the form of the denial is more subject to question, but it seems probable that the court rested its conclusion in that case on the principle that a general denial did not put in issue an allegation of the complaint to the effect that a given sum of money was due and owing from the defendant. These cases, we now conclude, are not founded on sound principles, and in so far as they conflict with what is here decided, they will not be followed.

On the other hand, for the purpose of sustaining all of the denials in his answer, the appellant cites and relies upon the case of *O'Brien v. Seattle Ice Co.*, *supra*. In that case we did say that the doctrine of negative pregnant is the doctrine of the common law, and had been abrogated by statute, but

it is manifest that there was no intention to negative the rules which require certainty in pleading, or to hold that denials in manner and form were sufficient, as the case was distinguished from the cases so holding which were cited as authority by the other side. We cannot hold, therefore, that this case sustains the sufficiency of the denials to the second paragraph of the first cause of action or the denials to second paragraph of the second cause of action.

The appellant claims further that he is entitled to judgment on his affirmative answer, but plainly the answer is nothing but a plea of tender, which the respondents can admit without waiving their cause of action. For the error, however, in holding the denial to the third paragraph of the first cause of action to be insufficient, the judgment is reversed, and the cause remanded to try the issue made thereby.

[No. 9162. Department One. March 22, 1911.]

THOMAS F. TRUMBULL *et al.*, *Respondents* v. JEFFERSON COUNTY *et al.*, *Appellants*.[1]

TAXATION—FORECLOSURE—SALE—ORDER OF SALE. Under a statute requiring the judge in a tax foreclosure to order the clerk to enter an order of sale to be signed by the judge and attested by the clerk, and to certify a copy thereof to the treasurer, a judgment, signed by the judge, containing an order of sale is a sufficient order of sale; and failure of the clerk to "attest" the same does not render it void, where the clerk certified a copy thereof to the treasurer.

SAME—PLACE OF SALE—JUDICIAL SALES. The requirement that a tax sale be made at the front door of the court house is complied with where it was held inside of the building, twenty-five or thirty feet from and in plain view of the glass front doors and of the people upon the street near the front doors.

Appeal from a judgment of the superior court for Jefferson county, Still, J., entered April 5, 1910, in favor of the

[1]Reported in 114 Pac. 186.

plaintiffs, after a trial on the merits before the court without a jury, in an action of ejectment. Reversed.

A. W. Buddress and *James W. B. Scott*, for appellants.

Trumbull & Trumbull, for respondents.

MOUNT, J.—The plaintiffs brought this action to set aside a tax deed to lot 4, block 109, of the original townsite of Port Townsend. This deed was issued by the county treasurer of Jefferson county to the county upon a sale of property for delinquent taxes. After issues were joined in the case and a trial was had, the trial court set aside the deed and permitted the plaintiffs to redeem the lot on payment of taxes delinquent at the time of sale. The defendants have appealed from that decree.

The plaintiffs do not allege or claim any irregularities in the delinquent tax foreclosure action up to the time of the decree therein, but they allege in the complaint that the treasurer's deed was void for the following reasons: (1) That the court in the tax foreclosure action did not direct the clerk to make out and enter an order for the sale of the premises against which judgment was rendered; (2) that no such order was signed by the judge and attested by the clerk; (3) that no certified copy of such order, together with a list of the property ordered sold, was delivered to the treasurer; (4) that the copy of the judgment delivered to the treasurer by the clerk was not a true copy, but was false and fraudulent; (5) that the treasurer pretended to sell said lot to said county without any process whatever and without process issued in the name of the state of Washington, and no order was ever made by said court as stated in the deed; and (6) that the sale was not held at the front door of the court house, but was held within the court house. The judgment entered by the trial court in this action recites, that in the foreclosure action "no valid order of sale was issued by said court, signed by the judge, and attested by the clerk;" that the treasurer "in his notice of sale did not describe the

date of the entry of said judgment," and "that said sale did not take place at the court house door as prescribed by law and set forth in the notice of sale, but took place in the inside of the court house and in the hall thereof;" and for these reasons adjudged the sale void and set aside the deed.

Several questions are presented by the appellants upon the sufficiency of the complaint in regard to the tender of taxes and the amount thereof, but our view of the merits of the case renders it unnecessary to discuss these questions. The original judgment in the tax foreclosure action was introduced in evidence in this case. This judgment appears upon its face to have been signed by the judge "in open court, this 15th day of November, 1907," but was filed by the clerk on December 6, 1907. It is true the clerk did not write the word "attest" on the face of the judgment and then sign his name, but he indorsed upon the original judgment the date of the filing thereof, together with his name. The decree upon its face ordered "the treasurer of plaintiff county to sell the said lands, and he is hereby directed and ordered to sell the said lands and premises in the manner prescribed by law to satisfy the judgment herein, that a deed be issued by the said treasurer to the purchasers at said sale," etc. Then follows a description of the lands ordered sold, among which is the lot in question. The decree then recites:

"It is further ordered, adjudged, and decreed that the clerk of this court certify and attest a copy of the decree as an order of sale and deliver the same to the treasurer of said plaintiff county as his authority for selling the hereinbefore lands and premises as hereinbefore directed and commanded."

Thereupon the clerk made a copy of the decree and added to the copy, below the judge's signature, the words, "Attest. John D. Phillips, Clerk;" and also attached his certificate that the same was a true copy of the original. This certificate was properly signed and sealed. This copy was delivered to the treasurer, who thereafter sold the property in dispute to the county. The sale was held inside the front

doors of the county court house, about twenty-five feet therefrom, in view of all persons who were at the door or who were passing along the street in front of the court house.

Respondents argue that the statute must be strictly followed in order to deprive them of their property, and that the order of sale under discussion is in violation of the statute, because the statute directs that the judge shall order the clerk to enter an order, which order shall be signed by the judge and attested by the clerk, and then to certify a copy of the order and deliver it to the treasurer. In *Warner v. Miner*, 41 Wash. 98, 82 Pac. 1033, in discussing a question almost identical with the one here presented, we said:

"This order and direction, no doubt, may be made in a separate order, or it may be made orally, or may be acted upon by the clerk without special direction. The judgment itself is such an order. Where the order of sale is issued as made out, it shall be signed by the judge and attested by the clerk, and a certified copy delivered to the county treasurer. The statute does not provide a form for the order of sale. We have no doubt that a certified copy of the judgment, signed by the judge and attested by the clerk, which judgment orders the property to be sold, is an order of sale in strict compliance with the provision of the statute."

The only difference between the judgment in that case and the one in this case is that here the clerk did not attach his signature with the word "attest" after the signature of the judge to the original judgment. This omission did not render the judgment void or inoperative. When the clerk certified a copy of the judgment as a copy of the original, this was all the authorization necessary for the county treasurer to proceed with the sale. The original was thereby attested by the clerk. 4 Cyc. 888. This disposes of the first five objections to the validity of the deed.

It is also contended that the sale was not made "at the front door of the court house," and for that reason the deed is void. The form provided by the statute for the notice of sale recites that the sale shall be made at the front door of

the court house, and this was also stated in the notice. We are satisfied that the phrase does not necessarily mean at the outside of the door, but means at such place as is most convenient, either inside or outside, so that a person desiring to attend such sale may readily find the place where the sale is to be, or is being held. The inclemency of the weather or some other such reason might make it impossible to conduct the sale upon the outside. Publicity would be as apparent inside as outside. The statute, by the use of the word "at," no doubt, intended that the sale might be made inside as well as outside, to suit the convenience of the purchaser or other conditions, so long as it was in view of persons who desired to become purchasers at such sale and was accessible for that purpose. It was shown in this case that the sale was made from a stair landing, twenty-five or thirty feet within the court house door, but directly in front of the two sets of double glass front doors, and that any person near such doors or upon the street in front thereof could see and hear what was being done. We are satisfied that said sale was regular and did not avoid the deed.

The trial court was in error, therefore, in avoiding the deed, and the judgment must be reversed, and the cause remanded with instructions to dismiss the action.

PARKER, FULLERTON, and GOSE, JJ., concur.

[No. 9207. Department One. March 22, 1911.]

J. W. KLEEB, *Plaintiff and Appellant*, v. ANDREW J. McINTURFF *et al.*, *Defendants and Appellants*.[1]

EVIDENCE—WRITTEN EVIDENCE—VARYING BY PAROL—SALES. When a bill of sale of a stallion, taken in part payment of land, was merely collateral to an oral sale of the land, parol evidence is admissible that the stallion was represented to be a pedigreed horse; since the bill of sale did not purport to state all the terms of the contract and does not contradict the same.

SALES—FRAUD—REMEDIES OF BUYER—DAMAGES. Upon discovering misrepresentations as to the pedigree of a stallion, the buyer may, instead of rescinding, elect to keep the animal and recover his damages.

SALES—FRAUD—MEASURE OF DAMAGES. The measure of damages for misrepresentations as to the pedigree of a horse, where the buyer does not rescind the sale, is the difference between the price paid and the actual value at the time of the sale.

Cross-appeals from a judgment of the superior court for Franklin county, Holcomb, J., entered May 3, 1910, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action for specific performance. Reversed.

Chas. E. Miller and *Herman Murray*, for plaintiff.

H. B. Noland and *Moulton & Henderson*, for defendants.

MOUNT, J.—This action was brought by the plaintiff to compel specific performance of a contract of sale of real estate situate in Franklin county. A decree was entered in the court below in accordance with the prayer of the complaint. Subsequently the court modified the judgment so that neither party was allowed to recover costs from the other. The defendants have appealed from the decree of specific performance, and the plaintiff has appealed from the order refusing to allow him costs.

[1]Reported in 114 Pac. 184.

There is no dispute about the fact that a contract was made. It appears that on May 6, 1908, the defendants were the owners of the land in question, being the southwest quarter of section 28, township 13, north, of range 31 E., W. M., containing 160 acres. On that day the parties entered into an oral agreement, the undisputed facts of which are that the defendants were to sell the land to the plaintiff for the sum of $3,300, payable as follows: $250 cash, the delivery of a certain stallion valued at $1,500, lumber from plaintiff's yard at Mesa in said county to the amount of at least $600, $500 cash to be paid December 1, 1908, and the remainder, $450, to be paid May 1, 1909 the latter two payments to bear interest at the rate of seven per cent and be secured by mortgage on the land. This agreement was made by one N. H. Brown, acting for the plaintiff. After the oral agreement was made, the parties went to the place of business of W. T. Anderson and stated to him the terms of the contract. Mr. Anderson, who was a notary public, thereupon prepared the deed, which was executed by the defendants McInturff and wife. This deed was left with Mr. Anderson to be delivered to the plaintiff when the payments were all made as agreed. Mr. Anderson also prepared a bill of sale of the stallion, which was executed as follows:

"Mesa, Wash., May 6, 1908.

"Know all men by these presents: That J. W. Kleeb for and in consideration of $1,500 to him in hand paid, the receipt of which is hereby acknowledged, do hereby transfer and turn over to A. J. McInturff one stallion named Sampson, and the same is free from all incumbrances.

"J. W. Kleeb, by N. H. Brown."

Thereupon the stallion was delivered to defendants, and the first cash payment—$250—was made, and the plaintiff went into possession of the land. Thereafter in the months of June, July, and August, the plaintiff delivered lumber to the defendants amounting to $759.76, and subsequently made the $500 payment. In the meantime the defendant McInturff

demanded, upon several different occasions, a pedigree of the stallion. This the plaintiff promised to furnish, but never did so. On or about December 8, 1908, the plaintiff tendered to the defendants the sum of $320.37, being the balance due, and demanded his deed, which defendants refused. Thereupon the plaintiff paid the money to Mr. Anderson and demanded the deed from him, which was also refused, for the reason that Mr. McInturff had notified Mr. Anderson not to deliver the deed until he received the pedigree of the stallion. Thereupon this action was brought.

The defendants, for answer to the complaint, alleged, in substance, that, at the time the contract was made, the plaintiff represented that the horse had a pedigree and was registered, and that the registration certificate would be delivered within two weeks from that time; that the horse was a good horse for breeding purposes, and would get with foal seventy-five per cent of the mares served; that the plaintiff had failed to deliver the certificate of registration; that the horse was worthless as a foal getter, and that the defendants had been damaged in the sum of $1,600 thereby, and prayed for a judgment for that amount. The plaintiff denied that such representations were made.

At the trial the principal issue of fact was whether the plaintiff or his agent had represented that the horse was a registered horse. A careful reading of the record convinces us that, at the time of the contract and immediately before it was made, representations were made that the horse was a registered horse, and that the defendants relied upon such representations. It is true the defendant A. J. McInturff testified that Mr. Brown told him, in answer to a question as to the ancestry of the horse, "He said the sire of the horse was a thoroughbred Clyde, and the mammy was half Clydesdale and half German Coach." It is also true that men versed in the pedigree of horses know that a horse of such lineage is not a subject of registration; but it is clearly shown, we think, that defendant McInturff was entirely ig-

norant of this fact. He testified that he knew that a registered horse was more valuable than one not registered, but that he did not know what was required for registration, and relied wholly upon the representations of Mr. Brown in that regard. The trial court refused to find that the plaintiff or his agent had represented that the horse was a registered horse and had agreed to deliver the certificate of registration to the defendants, but instead found "that at the time of the delivery of the said stallion Sampson by the plaintiff to the defendant Andrew J. McInturff, the said plaintiff, by his duly authorized agent executed to said defendant Andrew J. McInturff, in writing, a formal bill of sale of such stallion, duly conveying the title and covenanting against incumbrances, but that said bill of sale contained no other warranties."

It was argued below, and is argued here, that the bill of sale above set out contained the whole contract in writing, so far as the stallion is concerned, and that this part of the contract may not be varied by oral evidence. Jones on Evidence, p. 571, § 542, and Stevens on Evidence, art. 90, are cited to support this rule. The trial court evidently took this view of the bill of sale, and for that reason refused to find that the defendants had taken the horse upon the strength of the representation that the horse was a registered horse. It is apparent, in the light of the facts, that the bill of sale does not undertake to state the terms of the contract. It was merely collateral to the contract, and evidently given in pursuance thereof to show that the title of the horse had passed from Kleeb to the defendants. The statement that "the same is free from all incumbrances" was a warranty of that fact, but the mere fact that the bill of sale was reduced to writing and was signed by the plaintiff and accepted by the defendant, did not prevent either party from showing that it was also agreed that other property was to be delivered at the same time or subsequently, or that a saddle or bridle or a pedigree was also to be delivered with the horse.

This is especially true where it is conceded the delivery of the horse was but one of the items of the contract. It seems clear that in such case oral evidence may be received to show the terms of the contract, where it is admitted that the contract itself is oral. It follows that the collateral writing, which does not undertake to state all the terms of the contract, does not control. *Knowles v. Rogers*, 27 Wash. 211, 67 Pac. 572; *Puget Sound Iron & Steel Works v. Clemmons*, 32 Wash. 36, 72 Pac. 465. The trial court therefore erred in not finding that the plaintiff agreed to furnish a certificate of registration with the horse. The cause must be reversed for that reason.

The defendants did not offer to rescind upon discovering that the horse was not a registered one, but seek to retain the horse and recover damages. We think they may rightfully do this, and that their measure of damages is the difference between $1,500, which they paid for the horse, and the actual value of the horse at the time of the contract. The cause is remanded to the lower court to determine this question, and to enter a decree accordingly. Appellant will recover his costs in this court. The costs of the lower court will be adjudged upon final hearing there.

DUNBAR, C. J., PARKER, FULLERTON, and GOSE, JJ., concur.

ON REHEARING.

[Decided July 19, 1911.]

PER CURIAM.—A rehearing was granted in this case. Upon a reargument, we are satisfied with the conclusion reached upon the former hearing, and the result then announced will stand as the judgment of the court.

[No. 9215. Department One. March 22, 1911.]

M. L. Bevis, *Appellant* v. Big Bend Abstract Company, *Respondent*.[1]

Principal and Agent—Liability to Principal—Ambiguous Instructions. Instructions to an agent to use certain moneys in closing up a loan and the payment of judgments so that the loan would be a first lien on the land, do not render the agent liable for failure to pay off judgments that were subsequent to the mortgage, where in other letters the agent was instructed that the principal was not interested in these judgments and not to delay closing up the loan on account of them; since the instructions as a whole were ambiguous and susceptible of the construction that part of the money was to be paid to the borrower, which was done by the agent in good faith.

Appeal from a judgment of the superior court for Spokane county, Neal, J., entered February 25, 1910, upon granting a nonsuit, after a trial before the court and a jury, dismissing an action in tort. Affirmed.

Gallagher, Smith & Mack, for appellant, cited: 1 Am. & Eng. Ency. Law (2d ed.), pp. 1058, 1060; 31 Cyc. 1415, 1453, 1491, 1492; *Whitney v. Merchants' Union Express Co.*, 104 Mass. 152, 6 Am. Rep. 207; *Hall v. Storrs*, 7 Wis. *253; *Minneapolis Trust Co. v. Mather*, 181 N. Y. 205, 73 N. E. 987; *Marshall v. Ferguson*, 94 Mo. App. 175, 67 S. W. 935; *Bowerman v. Rogers*, 125 U. S. 585; *Welsh v. Brown*, 8 Ind. App. 421, 35 N. E. 921; *British American Ins. Co. v. Wilson*, 77 Conn. 559, 60 Atl. 293.

H. J. Hibschman and *Sessions & Warren*, for respondent, contended that letters of instruction are interpreted most strongly against the writer. *Craighead v. Peterson*, 72 N. Y. 279, 28 Am. Rep. 150. Especially so where they are subject to two interpretations and the agent has acted in good faith upon one of them. 31 Cyc. 1408; *Oxford Lake*

[1]Reported in 114 Pac. 191.

Line v. Pensacola First Nat. Bank, 40 Fla. 349, 24 South. 480; *Osborne & Co. v. Ringland & Co.*, 122 Iowa 329, 98 N. W. 116; *Minnesota Linseed Oil Co. v. Montague*, 65 Iowa 67, 21 N. W. 184; *Hopwood v. Corbin*, 63 Iowa 218, 18 N. W. 911; *Berry v. Haldeman*, 111 Mich. 667, 70 N. W. 325. If the instructions of a principal to his agent are ambiguous or capable of different constructions, the agent is not chargeable with disobedience or its consequences in case he makes an honest mistake and adopts a construction different from that intended by the principal, and in such cases the loss, if any, must fall upon the principal rather than the agent. 31 Cyc. 1454; 1 Am. & Eng. Ency. Law (2d ed.), 1062; 2 Ency. L. & P. 1050; *Minnesota Linseed Oil Co. v. Montague, supra; Falsken v. Falls City State Bank*, 71 Neb. 29, 98 N. W. 425; *Bessent v. Harris & Howell*, 63 N. C. 542; *Anderson v. Grand Forks First Nat. Bank*, 4 N. D. 182, 59 N. W. 1029; *Holmes & Co. v. Misroon*, 3 Brev. (S. C.) *209; *Pickett v. Pearsons*, 17 Vt. 470; *National Bank of Commerce v. Merchants' Nat. Bank*, 91 U. S. 92.

DUNBAR, C. J.—This is an action to recover money alleged to be wrongfully paid out by the defendant as agent of the plaintiff. The facts out of which the case grows are substantially as follows: M. L. Bevis, the appellant, had contracted to make a mortgage loan on certain real estate owned by one James Shelton, situated in Lincoln county, Washington. The respondent is a corporation doing business in Lincoln county, and is engaged in furnishing abstracts of title to real estate situate in said county. The appellant and Bevis Brothers, of which appellant is a member, had made several loans in Lincoln county prior to this time, and procured the abstracts of title from respondent, and the respondent had been in the habit of closing up their loans and attending to the details. The appellant ordered from respondent an abstract of title to the land upon which appellant was to make the loan to Shelton. After Shelton

and wife made the mortgage to appellant, and after the same was placed on record, certain judgments were procured in the superior court for Lincoln county against James Shelton, some of which became liens on this mortgaged property. After these judgment liens attached, Shelton and wife sold the land in question to one Kik, subject to the mortgage of appellant. Mr. Kik paid $899.81 to Bevis Brothers by agreement with Shelton, to be applied toward payment of these judgments, and Bevis Brothers afterwards sent this money to the Big Bend Abstract Company for the purpose, as the complaint alleges, of having the abstract company pay off these judgments so that the title to the property would be clear in Kik except as to the Bevis mortgage; and pursuant to that agreement, Bevis Brothers sent to the Big Bend Abstract Company $899.81 with written instructions what to do with the money. That letter is an exhibit in the case, and is couched in the following language:

"January 7th, 1909.

"Big Bend Abstract Company,
"Davenport, Wash.

"Gentlemen: You will please find enclosed check No. 4010 for the sum of $899.81 to be used in closing up the James Shelton loan. We will send you the abstract in a day or two with attorneys requirements attached. Mr. Shelton has sold the farm. There are a number of judgments and other liens against his land, all of which must be cleaned up so our loan will be a first lien on the land and title good in purchaser Mr. Kik. Very truly yours, Bevis Bros."

The Big Bend Abstract Company used all the money in accordance with instructions, except $542.30 which it turned over to James Shelton without paying off these judgments which were referred to. The judgments not being paid, Kik subsequently had to pay them to protect the land, and it is to recover back this $542.30, which appellant claims was wrongfully turned over to Shelton, that this action is brought. Upon the trial of the cause the case was taken from the jury by the court, who decided that the allegations

of the complaint had not been sustained by any testimony. The case was thereupon dismissed and judgment rendered to defendant for costs, and from such judgment of dismissal, this appeal is prosecuted.

There is no controversy over the facts in this case, and all the contention is with relation to the proper construction that should be placed upon the correspondence, and upon the force of the letter which is quoted above is based the appellant's contention that the respondent exceeded its authority in paying this money to Mr. Shelton. Of course it may be conceded that, where an agent violates his duties to his principal, whether it be by exceeding his authority or by negligence or omission in the proper functions of his agency, he is responsible to his principal for such damages as flow from the violation of such obligation; and if the authority for this transaction and the payment of this money had been confined to the letter quoted, we think there could be no question that the agent had exceeded his authority, for the direction seems to be plain and explicit that the duty of the respondent was, before paying any money to Mr. Shelton, to see to it (1) that the mortgage which the appellant was negotiating should be a first lien on the land, and (2) that the title should be good in the purchaser, Mr. Kik. But there was a long series of correspondence between these parties, commencing back several months when the first attempt was made to negotiate this mortgage loan by the appellant to Shelton, the first letter on the subject having been written March 3, 1908, where the respondent was informed that Bevis Brothers had advised Mr. Shelton that they would send the funds to the respondent for the purpose of closing up the loan, and that Mr. Shelton would call upon the respondent. These letters in relation to this loan were of frequent occurrence, and the loan was the only subject of the correspondence up to the date of the letter of January 7, 1909, set forth above. This was the first time that there was any intimation to respondent that it had any other duty to per-

form in the matter than to see that the appellant's mortgage should be a first lien on the land. The next letter addressed to the respondent was on January 14, 1909, as follows:

"We are inclosing you the abstract in the James Shelton loan. Clean up the mortgage on this land held by the Hypotheekbank, shown on sheet No. 17, also pay the taxes for 1907. We need the patents issued to Harry E. Watson and Thomas B. Kelley. When these three things are done return the abstract to us. Our loan will then be a first and valid lien on the land. Do not undertake to hold the abstract until the judgments are paid and the title cleaned up in every other way with the title good in Charles L. Kik. We want the abstract returned to us at once. Pay the Hypotheekbank, pay the taxes for 1907 and secure the patents. If you cannot secure the patents waive this requirement and then return the abstract any way."

On the same date another letter was written, as follows:

"In making settlement with James Shelton on his loan, please take out $3.20 for certified copies of patents. You will notice that the attorneys requirements call for these two instruments and they must also be recorded. Charge both of these items to Mr. Shelton in settlement."

On January 19, the following was written:

"How are you succeeding in closing up the James Shelton loan? As soon as you pay the taxes and the old mortgage held by the Hypotheekbank, our loan will be the first and valid lien on the land. We will send you within a day or two the original patents which are wanted for record to complete the title."

January 20:

"We are inclosing you for record the patents in the James Shelton loan. Kindly have these instruments recorded at once and shown on the abstract. Then there is nothing left to do except to pay the taxes out of the money which you have on hand and clean up the mortgage held by the Hypotheekbank. After this is done, bring the abstract down to date and return it to us when our loan will be complete. Do

not retain the abstract until all the judgments are cleaned up. We are not interested in these matters."

January 27:

"Please advise us promptly what condition the James Shelton loan is in and whether or not you have paid off the old mortgage held by the Hypotheekbank. We want to clean up this transaction. It has been on hand for a long while."

February 3:

"We have received the abstract in the James Shelton loan, but we find that you have not paid the 1907 taxes amounting to $40.20. Our instructions were to pay the taxes and the mortgage held by the Hypotheekbank. How does it happen that you did not pay these taxes? The 1908 taxes are not delinquent but the 1907 taxes are and should have been paid. Please advise us," etc.

It would seem from this volume of correspondence, and more to the same effect which we have not reproduced, that Bevis Brothers, at least to a certain extent, obscured the proper construction of the instructions given to their agent. As we have said, if the letter of January 7 had stood by itself, there would have been no excuse for the failure of the respondent to pay the judgments on the land subsequent to the execution of the mortgage; but this matter seems to have been lost sight of entirely by Bevis Brothers themselves, and their constant solicitude seems to have been with reference to the title of the land so far as their mortgage was concerned, and to the little bills which they had instructed the respondent to pay before settling the matter up with Shelton. In addition to this it would seem that that idea was forced upon the attention of the respondent in the letter of January 20, when they said:

"After this is done, bring the abstract down to date and return it to us, when our lien will be complete. Do not retain the abstract until all the judgments are cleaned up. We are not interested in these matters."

If the principals were not interested in the matter of paying off of the judgments, and specially instructed the agent to return the abstract before they were paid off, because they were not interested in them, it would seem that the agent would be justified in placing the construction upon the letters which it did place upon them, and that there was reason in the answer which it made to the appellant's claim, in a letter dated March 4, 1909, when it was said:

"In your letter of January 7, inclosing check for $899.81, you say these funds are to be used in closing up the James Shelton loan according to attorneys' requirements, etc., which would leave the impression that we were only closing up the loan and while further on you say that you wish your loan to be a first lien, 'and title good in purchaser, Mr. Kik,' this in itself might lead one to think that the money was to be held for the purpose of perfecting Mr. Kik's title, although you nowhere stated that this money was for that purpose or that you expected me to be concerned in any way about Mr. Kik's affairs or that Mr. Kik had any claim on this money. And in your letter of January 20th you again speak of completing your loan and say, 'Do not retain the abstract until all the judgments are cleared up. We are not interested in these matters.' It does seem to me that from all the correspondence that passed between us that I could not be held either legally or morally for this money, as you intimated over the telephone. If you expected any more than your loan closed or anything out of the regular course of business I would surely have expected you to have told me before the loan was closed."

Considering all the circumstances of this case, the fact that this money had been sent in connection with the mortgage loan desired by Bevis Brothers; that that, and that alone, had been the subject of all the correspondence, excepting the letter of January 7 in which the title of Mr. Kik had been incidentally mentioned; that the agent had been expressly informed the principal was not interested in judgments subsequent to the execution of his mortgage; that it appears from the record the respondent never had money enough in its possession to perfect the title so far as the mortgage was con-

cerned and also pay off the judgments which were subsequent liens on the land,—we think it would be hard and unjust to hold the agent responsible for the payment of the money to Shelton, with whom the respondent had been instructed to close up the business, and in a transaction which it had been so often urged to bring to a culmination.

The United States supreme court, in *Very v. Levy*, 13 How. 345, in discussing this question lays down this rule:

"But if the words in question touch only the particular mode in which an object, admitted to be within the power, is to be effected, and they are ambiguous, and with a reasonable attention to them would bear the interpretation on which both the agent and a third person have acted, the principal is bound, although upon a more refined and critical examination the court might be of opinion that a different construction would be more correct. . . . Such an instrument is generally to be construed, as a plain man, acquainted with the object in view, and attending reasonably to the language used, has in fact construed it."

In discussing the question of ambiguous instructions and interpretation between principal and agent, it was held in the case of *Minnesota Linseed Oil Co. v. Montague & Smith*, 65 Iowa 67, 21 N. W. 184:

"Where a principal gives to his agent instructions which are susceptible of two meanings, that meaning which the agent in good faith attaches to them and acts upon is to be adopted; and if loss occurs thereby, the principal and not the agent must bear it; and it matters not whether the principal had reason to believe, or not, that the agent so understood the instructions."

In *Craighead v. Peterson*, 72 N. Y. 279, 28 Am. Rep. 150, it is said that "letters of instruction, etc., in commercial transactions" "are interpreted most strongly against the writer, especially when they are susceptible of two interpretations, and the agent has acted in good faith upon one of such interpretations."

This seems to be the general rule, and there being no question of good faith of the agent involved in this case, and as

we think it intelligently acted upon the instructions given it, the judgment of the lower court will be affirmed.

PARKER, MOUNT, FULLERTON, and GOSE, JJ., concur.

[No. 9204. Department Two. March 23, 1911.]

GEO. M. McDONALD & COMPANY, *Appellant*, v. GEORGE R. JOHNS *et al.*, *Respondents*.[1]

MORTGAGES—PRIORITY—RECORD—BONA FIDE PURCHASERS — PREEXISTING DEBT. As between real estate mortgages given as security for preexisting debts, the one first executed and delivered takes priority, although the other was first recorded; a mortgagee for a preexisting debt not being a *bona fide* purchaser, within Rem. & Bal. Code, § 8781, providing that a recorded mortgage shall be valid as against *bona fide* purchasers from the date of recording.

Appeal from a judgment of the superior court for Douglas county, Steiner, J., entered March 7, 1910, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action to foreclose a mortgage. Affirmed.

C. C. Bryant, for appellant.

Sam B. Hill and *John W. Hanna*, for respondents.

DUNBAR, C. J.—Incorporated in the record in this case is a very lucid and forceful opinion rendered by the trial judge, and a very succinct statement of the facts, which we will adopt, there being no question raised as to the facts found by the court. Johns and wife, whom we will hereafter refer to as Johns, were indebted to appellant in the principal sum of $2,210, evidenced by three promissory notes, all executed and delivered at times prior to May 5. 1908. On May 5, 1908, Johns executed and delivered to appellant a mortgage on certain lands specified. Johns was also at the same time indebted

[1]Reported in 114 Pac. 175.

to Bechtol, one of the respondents, in the sum of $662.16, evidenced by a promissory note executed and delivered at a time prior to May 4, 1908. On May 4, 1908, Johns executed and delivered to Bechtol a mortgage on the same lands which had been mortgaged to appellant, and above described. Both mortgages were given to secure the payment of a preexisting indebtedness, and no new or additional consideration or extension of time of payment was given as an inducement to the execution of either of said mortgages. The Bechtol mortgage was executed and delivered first. The McDonald mortgage was recorded first. Quoting from the opinion of the court:

"Upon these facts the ultimate question is: which of these mortgages has the prior lien on the land in said sections 25 and 30? McDonald claims to be a 'bona fide purchaser' (incumbrancer) without notice of the Bechtol mortgage prior to the execution and delivery of his own. I will assume (without finding or deciding at this time) that he had no notice. The law upon which his claim to priority must rest is found at § 4441, Pierce's Code [Rem. & Bal. Code, § 8781] and reads: 'All deeds, mortgages and assignments of mortgages shall be recorded in the office of the county auditor of the county where the land is situated, and shall be valid as against bona fide purchasers from the date of their filing for record in said office; and when so filed shall be notice to all the world.' Of course, the term 'bona fide purchaser' means bona fide mortgagee or incumbrancer, as well; else the statute would have no application to mortgages at all. Hence, the statutory phrase will be used in that sense herein. This statute is for the protection of those who become bona fide purchasers *subsequent* to a given conveyance or mortgage, and has nothing to do with those who become such *prior* thereto. In other words, the recording act reaches forward with its benefits, and not backward. It imposes upon any given mortgagee the duty of making a public record of his mortgage for the information, guidance and protection of those who at a *subsequent* time may have occasion to deal concerning the land, failing in the discharge of which duty he shall lose the priority otherwise to be accorded to him. But a mortgagee owes no such duty to those who *precede* him, and as against them he neither gains nor loses anything by

recording his mortgage (except in those states where the statutes expressly provide otherwise)."

In the opinion of the learned judge there are collated and distinguished the principal cases on this subject, and the court concluded, as indicated, that the priority should be accorded to the party having received the first mortgage, and judgment was entered accordingly.

A review of the authorities convinces us that the judgment in this case should be affirmed. The doctrine of mortgages was originally, of course, purely equitable, and is yet as between the mortgagor and the mortgagee; and as between them it makes no difference whether the mortgage is recorded or not. The recording statutes were for the purpose, as is universally understood now, of giving constructive notice to innocent purchasers and incumbrancers, and the practical question in all these cases is, who are innocent purchasers and incumbrancers. Pomeroy, in the second volume of his Equity Jurisprudence (3d ed.), § 749, says:

"A conveyance of real or personal property as security for an antecedent debt does not, upon principle, render the transferee a *bona fide* purchaser, since the creditor parts with no value, surrenders no right, and places himself in no worse legal position than before. The rule has been settled, therefore, in very many of the states, that such a transfer is not made upon a valuable consideration, within the meaning of the doctrine of *bona fide* purchase;"

citing cases from Alabama, Arkansas, New York, Vermont, Massachusetts, New Jersey, Pennsylvania, Kentucky, Illinois, Mississippi, Tennessee, Texas, and Indiana, to sustain the text. It is also stated by the author that the doctrine is not universal, but that the weight of authority is in accordance with the text announced. It is also said, in discussing the question, at § 747:

"What constitutes a valuable consideration within the meaning of the doctrine which gives protection to a bona fide purchaser? No person who has acquired title as a mere volunteer, whether by gift, devise, inheritance, post-nuptual settle-

ment on wife or child, or otherwise, can thereby be a bona fide purchaser. Valuable consideration means, and necessarily requires under every form and kind of purchase, something of actual value, capable, in estimation of the law, of pecuniary measurement,—parting with money or money's worth, or an actual change of the purchaser's legal position for the worse."

And ordinary examples are given, as a contemporaneous advance or loan of money, or a sale, transfer, or exchange of property, made at the time of the purchase or execution of the instrument; the surrender or relinquishment of an existing legal right, or the assumption of a new legal obligation which is in its nature irrevocable. Jones, on Mortgages, vol. 1 (6th ed.), p. 433, also states that the weight of authority is to the effect that the equitable mortgage, the mortgage first given, will prevail over the subsequent mortgage recorded prior to it. In *People's Sav. Bank v. Bates*, 120 U. S. 556, a case which cannot be distinguished in principle from the case at bar, it was held that the doctrine that the *bona fide* holder for value of negotiable paper, transferred as security for an antecedent debt merely, and without other circumstances, is unaffected by equities or defenses between prior parties of which he had no notice, does not apply to instruments conveying real or personal property as security in consideration only of preexisting indebtedness; the court quoting from 2 American Leading Cases (5th Am. ed.), p. 233, where it is said:

"Whatever the rule may be in the case of negotiable instruments, it is well settled that the conveyance of lands or chattels as security for an antecedent debt will not operate as a purchase for value, or defeat existing equities."

"A creditor who takes a mortgage on realty merely as security for the payment of a debt or demand already due to him, and without giving any new consideration or being induced to change his condition in any manner, is not entitled to the protection accorded to a *bona fide* purchaser for value, as against prior liens or equities." 27 Cyc. 1191;

See, also, 24 Am. & Eng. Ency. Law (2d ed.), 139.

Outside of general authority, this view of the law has been distinctly sustained by this court in *Hicks v. National Surety Co.*, 50 Wash. 16, 96 Pac. 515. That was where a surety company took a bill of sale as security for a preexisting debt upon a breached contractor's bond where a prior unrecorded bill of sale had been given, and it was held that the surety company was not an incumbrancer for value in good faith, and that its lien was inferior to that of a prior bill of sale valid as between the parties, although not executed so as to be valid as to creditors of the vendor or subsequent incumbrancers in good faith. The court concluded its announcement in that case by saying:

"The instrument under which the appellant claims was taken as security for a preexisting debt or preexisting contingent liability. Under such circumstances does it come within the definition of an incumbrancer for value and in good faith, as that term is defined in law? Under the great weight of authority it does not."

And the first case cited was *People's Sav. Bank v. Bates*, *supra*.

The judgment is affirmed.

CROW, CHADWICK, and MORRIS, JJ., concur.

[No. 8975. Department Two. March 23, 1911.]

F. J. HERBERGER, *Respondent*, v. ORR COMPANY, INCORPORATED, *Appellant*.[1]

DAMAGES — LIQUIDATED DAMAGES — PENALTY — CONTRACTS — CONSTRUCTION. Where two parties agreed to be equally liable for the payment of a mortgage for $16,000 and that, on default of either to pay his part, the other party might pay the same and hold a lien for half the sum paid, and interest thereon, and a "bonus of $500 for having made such advance," the stipulation for the bonus is one for liquidated damages and not a penalty; since the inconveniences, loss, expenses and damages arising from the breach are not readily susceptible of proof and the sum is not disproportionate to the probable damage suffered.

Appeal from a judgment of the superior court for King county, Main, J., entered November 9, 1909, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on contract. Affirmed.

Charles P. Harris and *Bamford A. Robb*, for appellant.

Richard Saxe Jones, for respondent.

CROW, J.—This is an appeal from a judgment and decree of foreclosure, entered in favor of F. J. Herberger, plaintiff, against H. E. Orr Company, Incorporated, defendant.

The evidence is not before us, there being no statement of facts. The only question presented is whether the findings support the decree. The action as it now stands is for the recovery of $500, on the following contract, acknowledged and recorded:

"This agreement, made and entered into this 1st day of November, A. D. 1907, between F. J. Herberger and Catherine Herberger, his wife, the parties of the first part, and H. E. Orr Company, Inc., the party of the second part.

"Witnesseth: That whereas, the party of the second part is now the owner of a number of lots in East South Park Addition to Seattle, King county, Washington, and

[1]Reported in 114 Pac. 178.

"Whereas, the said party of the second part has sold to the parties of the first part a number of said lots, being about one-half (½) in value of the total number owned by the party of the second part, and

"Whereas, said lots are subject to a mortgage held by John Prentiss and Elizabeth Prentiss, his wife, for the sum of sixteen thousand ($16,000) dollars, payable eight thousand ($8,000) dollars on June 29th, 1908, and eight thousand ($8,000) dollars on June 29th, 1909.

"Now, therefore, it is agreed that each of the parties hereto shall pay one-half (½) of the payments to be made on said mortgage and said property shall be released from said mortgage in the following order:

"Blocks three (3), seven (7), five (5), ten (10), eleven (11), thirteen (13) and fourteen (14), such releases to be made only as payments become due on said mortgage, or necessity arises on outstanding contracts. Either of the parties hereto may make a payment on said mortgage whenever such necessity arises, and secure a partial release of the same, and such payments shall apply on the payment on said mortgage next due from said party.

"If either of the parties hereto shall fail to make payment of their one-half (½) of the amount due upon said mortgage on or before the day when the same becomes due, as specified in said mortgage, then the other party may make the same and any payment thus made by either party for the benefit of the other party, together with one-half (½) of any additional sum paid under the foregoing terms and conditions and interest on all payments at seven per cent per annum, shall immediately become a lien on the property of such other party, his heirs, administrators, executors or assigns, situated in East South Park, and not previously released from said mortgage, and shall continue to be such a lien for a period of six months, drawing interest at seven per cent, payable semi-annually, together with a bonus of five hundred ($500) dollars for having made such advance, and if at the end of six months from the time of such advance such lien shall not be paid, then it may be foreclosed immediately without right of redemption against all of the property subjected thereto."

Prior to the trial the parties made a stipulation as to certain facts, from which and the evidence the court in substance

found: That $8,070.26 principal, and $968.44 interest, matured on June 29, 1908, on a note secured by the mortgage, being the first of the two notes mentioned in the contract; that for its payment appellant and respondent were equally liable; that the mortgagees, through their attorneys, were threatening foreclosure for its nonpayment; that the mortgage provided for a reasonable attorney's fee to be fixed by the court on foreclosure; that on July 14, 1908, respondent, acting under the terms of the contract and to avoid foreclosure, paid to the mortgagees all principal and interest then due from appellant as well as from himself, and obtained a release of certain portions of the mortgaged lots which had been conveyed to him, but which release was not of property in the order mentioned in the contract; that appellant had knowledge of such payment by respondent; that he did not refund to respondent the sums so advanced for him; but that after the commencement of this action, he paid the second note mentioned in the contract, after it had matured on June 29, 1909; that about the same time he adjusted the matter of interest theretofore paid by respondent, it being then agreed that appellant's liability for the $500 mentioned in the contract was the only issue remaining to be determined herein; that the mortgage has been fully satisfied; that there is no method to ascertain what amount of costs, attorney's fees, expenses, and other damages, would have been incurred if the first payment had not been made by respondent upon demand of the mortgagees' attorneys, and if the mortgage had been then foreclosed; that the sum of $500 was fixed by the appellant and respondent agreeing thereto, as the proper amount to be inserted in the contract, and that it is not disproportionate to the probable damages suffered by the respondent, nor is it an unconscionable sum.

The case turns upon the proper construction of that portion of the contract whereby it was stipulated that if either party upon the other's failure should pay the entire amount then due upon the mortgage, the other would repay him one-

half of said amount "together with a bonus of $500 for having made such advance." Appellant contends that the sum thus designated as a bonus is nothing more or less than a penalty or forfeiture, the payment of which cannot be enforced in this action. Only one-half of the principal and interest which fell due on the first note in June, 1908, was an obligation of the respondent. It was appellant's duty to pay the other half and avoid a foreclosure which would have resulted in heavy costs, attorney's fees and expenses to appellant and respondent. In the absence of any evidence, we have no means for learning what inconveniences, loss, expense, or damages the respondent may have incurred in providing the funds with which to make, or in making, the payment of appellant's portion of the sum due and thus avoiding the foreclosure. Nor can we now know what expenses of foreclosure were avoided by the act of respondent. Although the contract refers to the sum of $500 as a bonus, it is apparent that it was fixed by the parties as liquidated damages agreed upon for their mutual protection.

"There are two excellent rules given for inferring that the parties intended the sum as liquidated damages: (1) Where the damages are uncertain, and not capable of being ascertained by any satisfactory and known rule, whether the uncertainty lies in the nature of the subject itself, or in the particular circumstances of the case; or (2) where from the nature of the case and the tenor of the agreement, it is apparent that the damages have already been the subject of actual and fair calculation and adjustment between the parties. As to whether a sum agreed to be paid as damages for the violation of an agreement shall be considered as liquidated damages or only as a penalty is held to depend upon the meaning and intent of the parties as gathered from a full view of the provisions of the contract, the terms used to express the intent, and the peculiar circumstances of the subject-matter of the agreement. The contract is to govern; and the true question is, What was the contract?" 13 Cyc. 90.

The damages which would result from appellant's failure

to pay his proportion of the debt were uncertain and difficult of exact ascertainment by any known or satisfactory rule. It is apparent that the parties intended to agree upon some fixed sum to be so paid as liquidated damages and that they did agree, although the term liquidated damages was not used in their written contract. Appellant cites and relies upon *McDaniels v. Gowey*, 30 Wash. 412, 71 Pac. 12, but the instrument there sued upon, not at all similar to the one here involved, was held to be an indemnity bond, imposing a penalty, and not intended to fix any definite sum as liquidated damages. In *Madler v. Silverstone*, 55 Wash. 159, 104 Pac. 165, we said:

"Generally speaking, it may be said, that when the damages arising from the breach of the contract which the obligation is given to secure, are uncertain in their nature and not readily susceptible of proof by the ordinary rules of evidence, and are not so disproportionate to the probable damages suffered as to appear unconscionable, and it is reasonably clear from the whole agreement that it is the intention of the parties to provide for liquidated damages and not a penalty, such a stipulation will be held to be one for liquidated damages."

Applying this test to the contract now under consideration, we conclude that the parties intended to, and did, fix the liquidated damages, which were not unconscionable in amount and cannot be regarded as a penalty.

The judgment is affirmed.

Dunbar, C. J., Chadwick, and Morris, JJ., concur.

[No. 9048. Department Two. March 23, 1911.]

G. S. Clute *et al.*, *Respondents*, v. North Yakima & Valley Railway Company, *Appellant*.[1]

Eminent Domain—Compensation—Damages from Railroad in Vicinity. Const. art. 1, § 16, providing that no private property shall be taken or damaged until just compensation has been made, does not entitle an owner of property to damages by reason of the construction of a railroad, where his property does not abut on the right of way, and his damage therefrom, or by the use of streets in the vicinity, is only such as the public in general suffers therefrom.

Appeal from a judgment of the superior court for Yakima county, Kauffman, J., entered June 6, 1910, in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action to enjoin the construction of a railroad. Reversed.

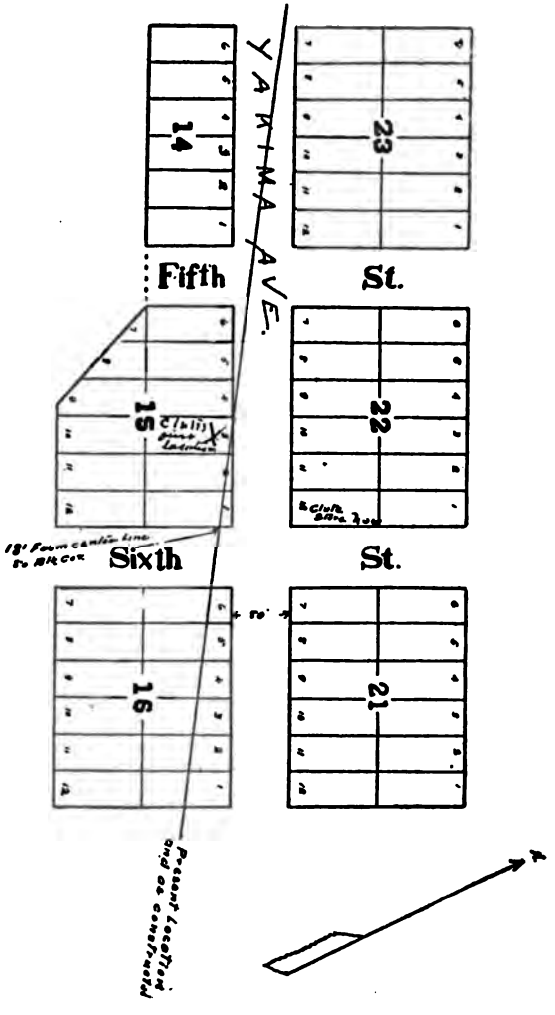
Englehart & Rigg, for appellant.

Snyder & Hatfield, for respondents.

Morris, J.—On May 6, 1909, the parties hereto entered into an agreement, whereby respondents sold to appellant lot 3, block 15, town of Zillah, for $2,600, for railway purposes. As a part of this consideration the appellant agreed to convey to respondents lot 12, block 22, town of Zillah, and to pay the balance within sixty days, the respondents within the same time to remove the building from lot 3, which they occupied as a general merchandise store. The appellant thereafter conveyed lot 12, and paid the balance of the consideration to respondents, and respondents gave the company a deed to lot 3, and moved the store building to lot 12. The appellant commenced the construction of its road along its contemplated

[1]Reported in 114 Pac. 513.

line across Yakima avenue, blocks 15 and 16, as shown on the following diagram:



And while so engaged and before any operation or use of the same, appellant commenced this action to enjoin such construction or operation. The only reference that need be made to the complaint is to say it was brought upon the theory that the construction and operation of the road would cause

respondents damage in various suggested ways; the admitted purpose of the action being to compel the company to institute condemnation proceedings, in which such damage might be ascertained and paid before it could further proceed in the building of the road. The court below granted the relief prayed for, and the company appeals.

The only question raised on the appeal being the necessity of condemnation proceedings under the situation here shown, it will not be necessary to refer to the evidence touching respondents' claim of damage, since the case must stand or fall upon the right to compel the railway company to condemn. It will be noted that lot 12, block 22, the present location of respondents' store, is not abutting upon the right of way of the railway company, and that the railway is being constructed upon land purchased by it for railway purposes, except where it crosses Yakima avenue, which latter right it exercises under authority from the railway commission and county commissioners, Zillah being an unincorporated village. Respondents' property is not, therefore, affected by any physical contact with the railway, nor is any street, so far as the same borders or abuts upon their premises, in any way interfered with. Art. 1, § 16, of the constitution, provides that:

"No private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court for the owner."

In order to come within the provisions of this section, private property must be taken or damaged before there arises a necessity for condemnation. The damage must be to the property itself or its appurtenances, or it must affect some right or interest which the owner enjoys in connection with his property, and which is not shared with, or enjoyed by, the public generally. While respondents' property may be rendered less valuable by reason of the close proximity of the railway, such lessened valuation cannot bring them within the constitutional provision until it further appears that some

special private property right other or different from the right or interest of the general public has been damaged for public use. The only damage here sought to be enjoined is such damage as the public would generally suffer in the use of Yakima avenue by reason of smoke, dust, noises, etc., caused by the construction and operation of the railway in its immediate vicinity. Such a damage is not the taking or damage of private property for public use as intended by the constitution. This same reasoning has been employed by this court in other cases in which it has been held that only the abutting property need be condemned. *Smith v. St. Paul M. & M. R. Co.*, 39 Wash. 355, 81 Pac. 840, 109 Am. St. 889; *In re Fifth Avenue etc.*, *ante* p. 218, 113 Pac. 762. This latter case, having been so recently decided and reviewing the cases from this court relied upon by respondents as announcing a departure from the *Smith* case, we feel it unnecessary to further extend this opinion. The cited cases are authoritative upon the principle here involved and must control.

The judgment is reversed, and the cause remanded with instructions to dismiss.

CROW and CHADWICK, JJ., concur.

[No. 9089. Department Two. March 23, 1911.]

BEN MOYSES *et al.*, *Respondents*, v. CHARLES N. BELL, *Appellant*.[1]

BILLS AND NOTES—BONA FIDE HOLDERS—TITLE FROM—STATUTES. Under Rem. & Bal. Code, § 3449, providing that a holder of a note who derives title through a holder in due course, and is not a party to any fraud or illegality affecting the instrument, has all the rights of such former holder, a *bona fide* holder in due course can pass a good title after maturity, although there has since been a failure of consideration as between the original parties, to the knowledge of the last assignee.

[1]Reported in 114 Pac. 193.

SAME—BONA FIDE HOLDERS—WHO ARE—CONSIDERATION—EXECUTORY CONTRACT. A bank taking as collateral security a note given in consideration of a perpetual water right, before maturity and before any failure of consideration by default on the water contract, is a holder in due course, as defined by Rem. & Bal. Code, § 3443.

SAME—TRANSFER—"DEFECTIVE" TITLE—STATUTES—CONSTRUCTION. The title to a note, given in payment of a perpetual water right, is not defective as defined by Rem. & Bal. Code, § 3446, where the maker's signature was not obtained by fraud or unlawful means or an illegal consideration and it was negotiated before its consideration had failed.

SAME—BONA FIDE HOLDERS—BURDEN OF PROOF. Under Rem. & Bal. Code, § 3450, where the title to a note is not defective, the burden can never be upon the holder of a note to show that he is a holder in due course.

BILLS AND NOTES—CONSIDERATION—FAILURE. A note given in consideration of an agreement to convey and furnish water to land on or before a certain date is based upon a valuable consideration, and there can be no failure of consideration until breach of the contract.

SAME—BONA FIDE HOLDER — CONSIDERATION—FAILURE—NOTICE. The transferee of a note is not deprived of his character as *bona fide* holder in due course by knowledge that it was given in consideration of an executory contract, where he had no notice of any breach of the contract at the time the same was transferred to him.

BILLS AND NOTES—NEGOTIABILITY—RESTRICTIONS. A contract not to negotiate a note to banks in the city of S., where the maker deals or is acquainted, indicates an assent that it may be otherwise negotiated.

MARSHALING ASSETS — SUBROGATION — APPEAL — DECISION—QUESTIONS NOT PRESENTED BELOW. Where the consideration for a note has failed, but the same is in the hands of a holder in due course as collateral security, the supreme court will not direct that the holder first exhaust its other security and order a subrogation, where such issue was not tried out in the court below and the rights of a receiver and other creditors similarly situated might be affected.

Appeal from a judgment of the superior court for King county, Tallman, J., entered February 21, 1910, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action on a promissory note. Affirmed.

Peters & Powell, for appellant.

Richard Saxe Jones, for respondents.

Crow, J.—Action by Ben Moyses and Charles B. Smith against Charles N. Bell, to recover principal and interest alleged to be due upon a promissory note. On trial without a jury, judgment was entered in plaintiffs' favor, from which the defendant has appealed.

The note reads as follows:

"$3200 Mountain Home, Idaho, February 7th, 1908.
"On or before one year after date I promise to pay to the order of the Great Western Beet Sugar Company thirty-two hundred & 00-100 dollars. Value received. Interest .... per cent.
"Due February 7, 1909. Chas. N. Bell."

The respondents alleged they were holders in due course. The appellant admitted the execution of the note, denied that respondents were holders in due course, and affirmatively pleaded that the note was executed and delivered to the Great Western Beet Sugar Company, a corporation, in part payment for a perpetual water right for the irrigation of 320 acres of land in Elmore county, Idaho; that the water was to be furnished in stipulated quantities on April 15, 1908, and at all times thereafter during irrigation seasons; that the payee failed to furnish the water on April 15, 1908, or at all; that the payee, being hopelessly insolvent, is in process of liquidation, and that these facts were all known to respondents when they acquired the note.

Appellant's contention, in substance, is that the consideration for the note has failed; that it was transferred to respondents after its maturity and after such failure; that the payee's title was defective, and that respondents, not being holders in due course, cannot recover. The evidence was sufficient to show that the Great Western Beet Sugar Company was constructing an irrigation system in Idaho; that on February 7, 1908, it entered into a written contract with appel-

lant, whereby, in consideration of $9,600, it sold him a perpetual water right for the 320 acres of land; that this contract recited the fact that the company had executed its warranty deed conveying the water right, the same to be placed in escrow with the Citizens State Bank of Mountain Home, Idaho, together with a copy of the contract itself; that the bank was instructed to surrender the deed to appellant upon payment of the note; that the company was to deliver water to appellant's land after April 15, 1908, in quantities stipulated; that appellant paid $6,400 in cash, and at the same time made and executed the note for the remainder of the purchase price; that the contract contained the following stipulation:

"Said party of the first part [the company] agrees that said promissory note shall not be sold, discounted or offered for sale to any banking or mercantile institution in the city of Seattle where the second party [appellant] deals or is acquainted:"

that on or about February 8, 1908, the Great Western Beet Sugar Company, being indebted to the Citizens State Bank of Mountain Home, Idaho, then delivered appellant's note and other notes to the bank, as collateral security; that the company did not furnish water to appellant on April 15, 1908, or at any time thereafter; that there was a total failure of consideration for the note, at all times after April 15, 1908; that early in October, 1908, respondents Moyses and Smith went from Seattle, Washington, to Mountain Home, Idaho, to investigate the Great Western Beet Sugar Company and purchase a controlling interest in its capital stock; that for two or three weeks they made an examination of its property and affairs; that about the same time they personally agreed to purchase and take over from the bank the indebtedness of the Great Western Beet Sugar Company, together with an assignment of the collateral security, including appellant's note; that in pursuance of this agreement they paid the bank $14,000 on October 28, 1908; that on February 10,

1909, three days after the maturity of the note, respondents took over the remainder of the debt and the collateral notes from the bank, then paying for that purpose the additional sum of about $25,000; that the face value of the collateral notes then held by the bank and transferred to respondents was about $80,000, but no evidence was offered as to their actual value.

The appellant, citing *Kost v. Bender*, 25 Mich. 515, and other cases, insists that the collateral, including his note, was returned to the original payee, the Great Western Beet Sugar Company, which again acquired title thereto after maturity, on February 10, 1909; that the payee then assigned the note to respondents as collateral security for a new indebtedness from it to respondents then created, and that respondents, having actual notice of the failure of consideration, then acquired the note, subject to appellant's right to make his defense. We do not think the contention that the note was returned to the payee, or that it again acquired title thereto, can be sustained. The evidence on this subject supports the respondents' position, to the effect that they purchased the existing debt of the company, and took an assignment of the collateral. Assuming, without so finding, that after looking into the affairs of the company for a period of two or three weeks in October, 1908, respondents learned facts sufficient to inform them that the Great Western Beet Sugar Company had then failed to perform its executory contract with appellant, they would nevertheless, under Rem. & Bal. Code, § 3449, have all the rights of holders in due course, if the bank, their assignor, was itself a holder in due course. The section mentioned reads as follows:

"In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were non-negotiable. But a holder who derives his title through a holder in due course, and who is not himself a party to any fraud or illegality affecting the instrument, has all the rights of such former holder in respect of all parties prior to the latter."

This section is only a statutory enactment of a rule theretofore announced by the courts. It is recognized in *Kost v. Bender, supra*, cited by appellant, as a rule existing in favor of all persons other than the original payee, who become purchasers from a *bona fide* holder of negotiable paper, even though such purchasers have notice of an infirmity in the paper, as between the original parties thereto. Speaking for the court, Cooley, J., said:

"It is perfectly true as a general rule, that the *bona fide* holder of negotiable paper has a right to sell the same, with all the rights and equities attaching to it in his own hands, to whoever may see fit to buy of him, whether such purchaser was aware of the original infirmity or not. Without this right he would not have the full protection which the law merchant designs to afford him, and negotiable paper would cease to be a safe and reliable medium for the exchanges of commerce. For if one can stop the negotiability of paper against which there is no defense, by giving notice that a defense once existed while it was held by another, it is obvious that an important element in its value is at once taken away."

Section 3443, Rem. & Bal. Code, thus defines a holder in due course:

"A holder in due course is a holder who has taken the instrument under the following conditions:—

"(1) That it is complete and regular upon its face;

"(2) That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact;

"(3) That he took it in good faith and for value;

"(4) That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it."

Section 3450 reads as follows:

"Every holder is deemed *prima facie* to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as holder in due course. . . ."

Our inquiry therefore is, whether the bank from which respondents acquired title was a holder in due course. It is shown by the undisputed evidence of S. G. Yerkes and B. L. Williams that the note was assigned to the bank on or about February 8, 1908. Section 3446 thus defines a defective title:

"The title of a person who negotiates an instrument is defective within the meaning of this act when he obtained the instrument, or any signature thereto, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud."

The payee did not obtain this note or appellant's signature thereto by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration; nor can we find from all the evidence that, when it negotiated the note to the bank on February 8, 1908, before its consideration had failed, such negotiation was a breach of faith, or made under such circumstances as amounted to a fraud. If we are correct in this conclusion, the title of the payee was not defective when it negotiated the note to the bank, and under § 3450, *supra*, no burden could ever be imposed upon the bank, or upon respondents as its assignees, to show that they were holders in due course; and this would be true even though respondents, the assignees of the bank, acquired the note after its maturity, and with notice that there had been a failure of its consideration at all times after April 15, 1908, occasioned by the payee's failure to perform its executory contract to thereafter furnish water.

Our findings are that the note was originally given for the company's agreement to convey the right and furnish water on and after April 15, 1908. This was a valuable consideration. No failure of such consideration could possibly occur until after that date. The bank held the note for more than two months prior to any such failure. The courts have repeatedly held that knowledge by an endorsee of a note that it

had been given in consideration of some executory contract or agreement of the payee, which the payee afterwards fails to perform, will not deprive the endorsee of his character of a *bona fide* holder in due course, unless prior to its assignment to him he had notice of the breach of the executory contract, and that such breach had theretofore occurred. *Rublee v. Davis*, 33 Neb. 779, 51 N. W. 135, 29 Am. St. 509; *Miller v. Ottaway*, 81 Mich. 196, 45 N. W. 665, 21 Am. St. 513, 8 L. R. A. 428; *Davis v. McCready*, 17 N. Y. 230, 72 Am. Dec. 461; *Jennings v. Todd*, 118 Mo. 296, 24 S. W. 148, 40 Am. St. 373; *Maas v. Chatfield*, 90 N. Y. 303; *Tradesmen's Nat. Bank v. Curtis*, 167 N. Y. 794, 60 N. E. 429, 52 L. R. A. 430. The deed and contract for the water right were placed in escrow with the bank. Assuming this fact was sufficient to give it notice of the consideration for which the note was given, yet under the above authorities the bank was a holder in due course for value, having obtained the note long prior to the company's breach of its executory contract. In *Maas v. Chatfield, supra*, a note dated November 24, 1878, maturing in four months, was given in payment for salted hides sold to the maker by the payee, which were to be delivered December 20, 1878, prior to the maturity of the note. In an action against the maker by an endorsee, the court said:

"He [the defendant] says, if the hides had been delivered, he should have paid the note. The sale and promise to deliver was not less a consideration than the actual delivery would have been. But applying his argument to the memorandum as part of the contract, the appellant contends that the note was made upon the 'agreement of Rosenbach & Co. to deliver the hides on December 20, or pay the note on that day.' If this is so, it would not within the rule above stated, relieve the defendant. The condition was not to be performed until December 20, so that from November 27, to that time, it was a good and valid note, even in the payees' hands. The maker could not have reclaimed it. If it matured before December 20, the payees could have enforced payment. As it was, they had the legal title and the power of disposition. It was negotiable by its terms, and was in fact sold for value and trans-

ferred to the plaintiff on the day it was given. A subsequent violation of the agreement on which it then stood would not vitiate the note, or subject it to a defense good only against one for which no consideration had been given."

The contract between appellant and the Great Western Beet Sugar Company imposed an express limitation upon the payee's right to negotiate the note, to the extent only that it should not be negotiated to certain parties in Seattle. This would seem to indicate an assent of the appellants to its negotiation to other parties or elsewhere. In giving the note appellant thus relied upon the financial responsibility and integrity of the payee for its fulfillment of the contract. The following observations of the supreme court of Missouri, in *Jennings v. Todd, supra*, are pertinent:

"A great part of the improvement of the country, and of business generally, is carried on with money raised by the discount of notes given upon executory contracts, and if the maker could be allowed to defend against such notes, in case of a breach of contract, on the ground that the indorsee, though in other respects *bona fide*, had knowledge of the transaction out of which the note grew, all confidence in such notes as negotiable paper would be destroyed and such business would be paralyzed. By making and delivering a negotiable note, the maker is held to intend that it may be put in circulation and that no defenses against it exist. In purchasing such note no inquiry as to the consideration is required. If a failure of consideration occur, the maker must look to the payee for indemnity."

In *Miller v. Ottaway, supra*, the supreme court of Michigan, after citing authorities, said:

"From the foregoing authorities, and upon reason, the correct doctrine appears to be that it is not a good ground of defense against a *bona fide holder* for value that he was informed that the note was made in consideration of an executory contract, unless he was also informed of its breach. If he had knowledge of the breach, the defense may be interposed. . . . A mere collateral agreement or warranty made at the time the note was given does not affect the validity or nego-

tiability of the note, although the purchaser before maturity may know of such agreement."

On the facts proven and the authorities cited, we conclude that the bank was a holder in due course, and that the respondents, having derived title from the bank and not being parties to any fraud or illegality affecting the note itself, have, under § 3449, *supra*, succeeded to all rights of the bank as its assignee.

Appellant, asking the equitable relief that respondents be required to first exhaust other collateral, or that he be subrogated thereto, in his answer alleged:

"That as this defendant is informed and verily believes, the plaintiffs acquired the note sued upon, if at all, as collateral security to another and principal obligation of the Great Western Beet Sugar Company and along with a large amount of other collateral and securities, the amount or value of which to this defendant is unknown but which he alleges is largely in excess of the consideration paid by him for said principal obligation, if any was so paid, and also largely in excess of said principal obligation or note."

There was evidence that collateral of the par value of $80,000 was transferred to respondents by the bank when they succeeded to its rights, but there is no evidence of the actual value of such collateral. The appellant did not urge this defense on the trial below although pleaded, nor did he ask findings relative thereto. It appears that the Great Western Beet Sugar Company has passed into the hands of a receiver. After respondents have fully satisfied the debt due them from the Great Western Beet Sugar Company by collecting and applying the proceeds of the collateral, the remainder of such collateral, if any, will belong to the company, or its receiver. The appellant insists that we should now make an order of subrogation so that he may be enabled to look directly to any surplus collateral now held by respondents, which they may not need to secure the entire indebtedness due them; but in view of the rights of the receiver,

and of other possible creditors who might also be entitled to subrogation and to participate in the same collateral, we think no such order should be made in this action.

The judgment is affirmed.

MORRIS and CHADWICK, JJ., concur.

[No. 9058. Department One. March 23, 1911.]

THE STATE OF WASHINGTON, *on the Relation of A. G. Linhoff, Respondent*, v. SEATTLE, RENTON & SOUTHERN RAILWAY COMPANY, *Appellant*.[1]

STREET RAILWAYS—TRANSFERS—DIVISION OF FARES—FRANCHISES—"LOCAL ROUTE"—"SUM OF RUNS"—CONSTRUCTION. Under a street car franchise providing for an exchange of transfers with other companies on a "basis of settlement that the transfers shall be redeemed at or for such proportionate part of the fare paid as the run or local route of the car on which transfer is received bears to the sum of the runs of the local route of the cars from which the transfer is issued and on which the transfer is received," the entire distance that a passenger may travel upon each system of railway constitutes a unit, equal in quantity and value, in the basis of settlement; and where only two systems were involved in an exchange, the sum of the runs is two, and settlement must be made by one-half of the fare to each company; the words "local route" meaning the entire distance a passenger may travel upon one system, regardless of the fact that different cars may be used; and "the sum of the runs" evidently being intended to cover the contingency of there being in the future more than two street car systems in the city exchanging transfers (GOSE and MOUNT, JJ., dissenting).

Appeal from a judgment of the superior court for King county, Gay, J., entered March 2, 1910, upon findings in favor of the plaintiff, in an action for a writ of mandate to compel the issuance and receipt of transfers by street railway systems. Affirmed.

Will H. Thompson and *Morris B. Sachs*, for appellant.

Scott Calhoun and *H. D. Hughes*, for respondent.

[1]Reported in 114 Pac. 431.

PARKER, J.—This is a mandamus proceeding commenced in the superior court for King county, wherein the relator prayed for relief substantially as it was finally granted by the issuance of a writ of mandate, directed to the defendants Seattle, Renton & Southern Railway Company and the Seattle Electric Company, as follows:

"You are hereby commanded that you and each of you, immediately upon receipt and service of this writ upon you, issue transfers, when demanded, upon presentation of a five-cent fare, or school children's ticket when presented by a school child, from all of your lines within the city limits to all of the lines of said other company, and that you and each of you receive the transfers so issued by such other company, and carry such passenger to any point on your line in the same general direction within the city limits, upon a basis of redemption by each company of two and one-half cents for every transfer issued by it on a five-cent fare and one and one-fourth cents for every transfer issued on a school children's ticket."

From this decision, the defendant Seattle, Renton & Southern Railway Company has appealed to this court.

The facts upon which the correctness of the decision of the trial court may be rested are, in substance, as follows: The appellant and the Seattle Electric Company each own and operate a system of street railway in the city of Seattle. These are the only systems of street railway in operation in the city. Appellant operates its system of railway under a franchise granted by the city to its predecessor in interest, containing a provision requiring it to give and receive transfers to and from all other systems of street railway in the city as follows:

"Transfers:—The payment of a cash fare or the presentation of a ticket shall entitle the passenger to a transfer to any line of any street railway company now operating within the city limits, or that may hereafter operate therein, which shall give and receive transfers to and from all the lines owned, operated or controlled by such company, to and from the lines

of grantee, his successors and assigns, on the basis of settlement that the transfer is to be redeemed at or for such a proportionate part of the fare paid as the run or local route of the car on which the transfer is received, bears to the sum of the runs of the local route of the cars from which the transfer is issued and on which the transfer is received; but no such transfer shall be good except upon the first connecting car at the point of transfer and upon a car going in the same general direction."

The Seattle Electric Company operates its system of street railway under franchises granted by the city, which the superior court has adjudicated in this case require that company to give and receive transfers to and from appellant's system of railway upon the terms specified in the writ of mandate above quoted. The Seattle Electric Company was a party defendant to this proceeding in the superior court, and it has not appealed from the final decision therein, which determined its duties and obligations relative to exchange of transfers with appellant. The railway system of appellant consists of a single line extending from the business center of the city to the city limits on the south, a distance of several miles. The railway system of the Seattle Electric Company consists of a network of lines covering largely the whole city. A passenger has the right to ride for a five-cent fare from one of the termini of the railway system of the Seattle Electric Company to another terminus thereof in the same general direction, or to any intermediate point. A passenger also has the right to ride from one terminus of the railway system of appellant to the other for a five-cent fare. School children have the same right upon the railway system of both companies upon presentation of a school children's ticket, which they may purchase from the respective companies at two and one-half cents each. The right of a passenger to so ride the entire distance between any two termini of each system of railway is not affected by the number of transfers it may be necessary for him to make from one car to another in accomplishing such a journey. In making such journey a pas-

senger would ride in some instances a greater, and in some instances a less, distance upon the Seattle Electric Company's system than he would upon appellant's system.

We have given no attention to the conditions under which the Seattle Electric Company may be required to exchange transfers with appellant under the franchises of the Seattle Electric Company as an original proposition. That question was finally adjudicated by the superior court, and as we have noticed, the Seattle Electric Company has not appealed therefrom. We need, therefore, to look no further than the language of the writ of mandate above quoted to ascertain what those conditions are. From that language it appears that the duties of the Seattle Electric Company and of appellant are the same towards the public and towards each other relative to exchange of transfers, unless we are to conclude that the superior court has erroneously determined the duties of appellant in that regard under its franchise. The question then is, not what the duty of the Seattle Electric Company is, but what is the duty of appellant under its franchise? If it be found that the conditions upon which appellant is required to exchange transfers under its franchise is consistent with the conditions upon which the Seattle Electric Company is required to exchange transfers, so that the rights of neither will be violated by enforcing such exchange, it will necessarily follow that the decision of the superior court is not erroneous. The position of counsel for appellant is, that it cannot be required to exchange transfers unless the basis of settlement for such exchange shall be as provided in its franchise. For the purpose of our present inquiry, we will adopt this view, though counsel for the relator argue that the basis of settlement is not necessarily the test of appellant's obligation to exchange transfers.

We have seen that appellant's franchise provides for exchange of transfers with any company now or hereafter operating street railways in the city which shall give and receive transfers to and from the lines of appellant, "On the

basis of settlement that the transfer is to be redeemed at or for such a proportionate part of the fare paid as the run or local route of the car on which transfer is received bears to the sum of the runs of the local route of the cars from which the transfer is issued and on which the transfer is received." Thus it is plain that appellant is required to exchange transfers with all companies operating street railway systems in the city, whenever such company or companies consent to or are required to exchange transfers with appellant upon the basis of settlement set forth in its franchise. This brings us to the inquiry, What is that basis of settlement?

Counsel for appellant contend, in substance, that the proper basis of settlement under its franchise is to give to each company such proportion of the fare of each passenger transferred as the distance traveled upon each system of railway bears to the entire distance traveled upon both systems upon such fare and transfer, treating the distance which the passenger is so entitled to travel upon each system as the distance actually traveled, and that this would result in appellant receiving more than one-half of the fare. For the purpose of our inquiry we will assume that it is practical to arrive at a settlement upon this basis with a sufficient degree of accuracy, if it is intended, by the terms of appellant's franchise, to make that the basis of settlement. Counsel for relator contend, in substance, that each company is entitled to such proportion of the fare as the distance the passenger may travel, regarded as a unit, upon its system of railway bears to the sum of all the distances the passenger may travel, each regarded as a unit, upon all the systems of railway over which such passenger may travel upon such fare and transfers issued therefor. That is, the distance the passenger may so travel upon each system must be regarded as a unit of equal value. Now, if each system of railway, or rather the entire distance upon each of which the passenger may ride for one fare and transfers issued therefor, is a unit of equal value to be used in computing the proportionate amount of the fare each com-

pany is entitled to, then the relator's contention is well founded.

We will first consider "*The run or local route of the car on which transfer is received.*" Treating that as a unit for the purpose of determining its value, as compared with the whole, the question is suggested, does it mean that the passenger may ride the same distance on that railway system as if he had paid the usual fare, or does it mean that he may travel only the distance run by the car upon which he first tenders the transfer. It seems to us the words "local route," there used, means the entire distance the passenger may travel upon that system of railway as if he had paid the ordinary fare, whether he changes cars upon that system or not. If we should hold that the local route of that car meant only the distance that the first car upon which the transfer is tendered proceeds, that company could so regulate the running of its cars that connect with the system issuing the transfer that such cars would proceed from such connection a very short distance. This is plain by reason of the fact that the distance each car is run is within the control of the company operating the system, as the evidence shows. There does not appear to be any requirement that passengers shall be carried over a route by one or any particular number of cars. This would enable the company to practically nullify this transfer provision. We are of the opinion that this provision means that such a transfer gives the passenger the same right to travel, as to distance, over the railway system to which it is tendered as if he paid an ordinary fare upon that system.

It seems to us the other units going to make up the whole are to be measured by the same standard, that is, that each consist of the entire distance a passenger may travel over each of the systems of railway upon such fare and transfers issued therefor as if he was paying an ordinary fare upon each of such systems. The language defining the whole is, "*The sum of the runs of the local route of the cars from which the transfer is issued and on which the transfer is received.*" This

language, it is argued, was evidently used in view of the possibility of there being in the future more than two companies operating street railway systems in the city, and was intended to require such an exchange of transfer between all of such companies and appellant's system as would enable a passenger to ride the entire distance across the city in one general direction upon one fare, even though such passenger so rode over portions of the lines of all such railway systems regardless of their number. It may be that an attempt was thus made to provide such a general transfer system. We express no opinion as to how nearly it was accomplished by this language. However, we are here only concerned with two systems, and the language of this transfer provision of appellant's franchise furnishes a basis of settlement between two as it would between a greater number of systems. The word "sum" is as correctly used in referring to the result of two units added, as in referring to any number of units added. We conclude that each system of railway, or rather the entire distance a passenger may travel upon each system of railway in the city, constitutes a unit, the sum of which goes to make up the entire service required to be furnished a passenger upon payment of one fare. Each of these units, we hold, must be regarded as equal in quantity and value, and since there are here involved only two systems of railway, the distance a passenger is entitled to so ride upon each will be regarded a unit, and, of course, their sum as two. It follows that the appellant and the Seattle Electric Company are each entitled to one-half of the fare thus earned. This is the basis upon which the trial court decided that the settlement is to be made under appellant's franchise, and we think that decision is free from error.

It is suggested that appellant's franchise seems to require it to issue transfers upon the presentation to it of a ticket by a passenger, as well as upon a cash fare, and it appears in the evidence that it sells tickets in quantities at four cents each, which entitles a passenger to ride the entire length of its

railway in the city. This is in no way involved in this case. The writ of mandate goes no further than to require the exchange of transfers upon the payment of a five-cent cash fare, and school children's tickets which are in effect two and one-half-cent cash fares.

We are of the opinion that the decision of the superior court should be affirmed. It is so ordered.

DUNBAR, C. J., and MORRIS, J., concur.

GOSE, J. (dissenting)—I think the conclusion reached by the majority of the court does violence to the language of the franchise. It would seem that if the city had intended that the appellant should give and receive transfers on the basis of an equal division of the fare, it would have so provided in plain and unequivocal terms. It did provide, however, that the redemption should be made "for such a proportionate part of the fare paid as the run or local route of the car on which transfer is received bears to the sum of the runs of the local route of the cars from which the transfer issued and on which the transfer is received." The meaning of the language quoted is somewhat obscure, but it is apparent to the writer that it means something else than that a transfer shall be made in all cases on the basis of an equal division of the fare. I think a reasonable construction of the words leads to the conclusion that the city intended that the redemption should be made on the basis of the distance traveled by each passenger over the respective lines. This construction would protect the equities of the parties, and harmonize with the language of the franchise.

I therefore dissent.

MOUNT, J., concurs with GOSE, J.

[No. 9132. Department One. March 23, 1911.]

J. R. Pickle *et al.*, *Appellants*, v. Robert Anderson, *Respondent*, Anna Anderson, *Intervener*.[1]

Election of Remedies—Inconsistent Actions—Bar. An action by the makers of a note and mortgage against the payee and others for an accounting for the proceeds thereof, constitutes an election of remedies, and precludes the plaintiffs from prosecuting an action for a cancellation, as the same are inconsistent.

Parties—Intervention—Leave of Court. Application for leave to intervene being made *ex parte*, the refusal of the court to strike a complaint in intervention, filed without leave, is equivalent to an order permitting the filing thereof.

Payment—Pleading. Payment is an affirmative defense to be pleaded, and cannot be raised under a claim of want of consideration.

Dismissal and Nonsuit—Interveners—Statutes. The dismissal of an action for the cancellation of a note and mortgage does not affect an intervener's right as holder to foreclose, under Rem. & Bal. Code, § 202, authorizing an intervener to demand relief adversely to the parties, and Id., § 203, requiring the court to determine the rights of the intervener at the same time the action is decided.

Appeal from a judgment of the superior court for Lincoln county, Neal, J., entered August 8, 1910, in favor of the defendant and intervener, dismissing an action to cancel mortgages. Affirmed.

John M. Gleeson and *Joseph F. Morton*, for appellants.

H. J. Hibschman and *Sessions & Warren*, for respondent.

Gose, J.—This action was brought to cancel two mortgages. The one secures the payment of a note drawn for $11,093. The other secures the payment of a note drawn for $300. The larger note and mortgage were executed on the 5th day of June, 1908. The substance of the complaint is that the Lincoln County State Bank and its officers, through fraudulent methods and without any consideration, induced the plaintiffs to execute the notes and mortgage to the de-

[1]Reported in 114 Pac. 177.

fendant, a relative of such officers. The defendant denied the charge of fraud and want of consideration, and alleged affirmatively that the plaintiffs, with full knowledge of the facts, on the same day this action was commenced, commenced an action in the same court against the Lincoln County State Bank and against E. W. Anderson, one of its officers, for the purpose of compelling them to account for the proceeds of the mortgages and notes which are the subject of this action. This was not denied.

On December 31, 1909, one Alex Anderson was permitted to file a complaint in intervention, wherein he alleged ownership of the larger note and mortgage, and prayed a foreclosure. Alex Anderson died about the 1st day of January, 1910. Upon stipulation the present intervener, Anna Anderson, filed her complaint in intervention on February 9, without obtaining leave of court. The purpose of her complaint is to secure a foreclosure of the larger mortgage. After alleging the making of the note and mortgage for a valuable consideration, and the failure to pay the interest which became due on the 5th day of June, 1909, she alleges that Alex Anderson, the first intervener, prior to his death, assigned the note and mortgage to F. W. Anderson, whom she alleges assigned it to her. In her answer to the complaint she alleges affirmatively, as the defendant does, the commencement of the action for an accounting for the proceeds of the mortgage and notes. This is not denied. In the action for an accounting, which was commenced upon the same day and in the same court as the present action, the plaintiffs prayed for an accounting of all the business transactions between them and the bank and E. W. Anderson, including the notes and mortgages embraced in this action, and for a judgment for the plaintiffs for such sum as the "court ascertains to be due upon the taking of such accounting." The court declined to hear any testimony upon the part of the plaintiffs, dismissed the action as to them, and

entered a judgment for the foreclosure of the intervener's mortgage. The plaintiffs have appealed.

The action was dismissed upon the ground that, with knowledge of the facts, the appellants elected to prosecute an action for an accounting against the bank and one of its officers, and that the two remedies are inconsistent. The action for an accounting was determined against the plaintiffs, and the judgment was affirmed upon appeal to this court. *Pickle v. Lincoln County State Bank*, 61 Wash. 545, 112 Pac. 654. We think the methods of redress are inconsistent, and that the prosecution of the action for an accounting operated as an election to pursue that remedy and no other.

"The election is not restricted to any class of remedies. Whenever the law supplies to a party two or more methods of redress in a given case, based upon inconsistent theories, however those methods may differ, either in the form or in the forum of procedure, or in the personality of the parties to the several proceedings, the party is put to his election, as a choice of either is a bar to his resort to the other." 7 Ency. Plead. & Prac. 361.

In *Gaffney v. Megrath*, 23 Wash. 476, 63 Pac. 520, it was held that, where an attorney had, without authority from the client, accepted a quantity of brick in satisfaction of the judgment, and the judgment creditor thereafter, with knowledge of the facts, brought suit against her attorney for the value of the brick, her conduct operated as a ratification of his acts, satisfied the judgment, and precluded her from prosecuting a garnishment proceeding upon the original judgment. In that case the court said:

"It is a well settled rule of law that where there exists an election between inconsistent remedies, a party is confined to the remedy which he first adopts;"

and that the law would tolerate no such absurdity as a recovery of a judgment against her attorney upon the claim that he had received payment from the judgment debtor, and the subsequent enforcement by her of the original judgment.

In the accounting action the appellants here sought to have a judgment for money entered in their favor, on an accounting which would include the notes and mortgage in controversy in the case at bar. It is obvious that the election to recover a judgment for the amount of the notes precludes the maintenance of an action for their cancellation.

In *Johnson v. Shuey*, 40 Wash. 22, 82 Pac. 123, cited by the appellants, it was held that, where two or more persons are obligated to pay the same debt, the pursuit of one debtor does not relieve the other, unless the debt is collected from the debtor first pursued. It was said, however, that it is undoubtedly true that, where one has a choice of two or more remedies for the redress of one wrong, the selection of one is a bar to the subsequent exercise of any of the others. *Dane v. Daniel*, 28 Wash. 155, 68 Pac. 446, cited by the appellants, is not in point. In that case the first remedy sought was not an available one.

The other questions suggested are technical, and may be considered together. It is true that the present complaint in intervention was filed without having obtained the leave of court, and that it is called an amended complaint in intervention. Applications for leave to intervene are made *ex parte*, and the refusal of the court to strike the complaint in intervention is equivalent to an order permitting it to be filed. Rem. & Bal. Code, § 202. The fact that it is called an amended complaint does not make it so. It contains the proper averments of the making of the notes and mortgage, and the ownership of the intervener. Payment is an affirmative defense, and no payment is pleaded. The appellants' contention was, and is, that there was no consideration for the note. The note and mortgage were admitted in evidence, and the entire amount was due when the judgment was entered.

The dismissal of the action as to the appellants did not affect the right of the intervener to pursue the foreclosure of the mortgage. An intervener may unite with the plaintiff

or the defendant, or may demand relief adversely to both. Rem. & Bal. Code, § 202. The court is required to determine the rights of the intervener "at the same time the action is decided." Rem. & Bal. Code, § 203.

The judgment is affirmed.

DUNBAR, C. J., FULLERTON, PARKER, and MOUNT, JJ., concur.

[Nos. 8717, 8718. Department One. March 23, 1911.]

THE STATE OF WASHINGTON, *on the Relation of Leopold F. Schmidt et al., Plaintiff*, v. THE SUPERIOR COURT FOR THURSTON COUNTY *et al., Respondents.*[1]

JUDGMENT—CONCLUSIVENESS—JUDGMENT ON DEMURRER. Where a demurrer to the merits of a petition in intervention is sustained and the complaint dismissed, the judgment is final and a bar to any recovery on the grounds stated.

SAME—DISMISSAL IN EQUITY. A decree dismissing a bill in equity without restricting its scope is presumed to be on the merits and is *res judicata*.

EMINENT DOMAIN—PROCEEDINGS—REVIEW—CERTIORARI. Error in sustaining a demurrer to a complaint in intervention in condemnation proceedings can only be reviewed by a timely application for a writ of certiorari.

JUDGMENT—CONCLUSIVENESS—EMINENT DOMAIN—PLEADINGS. The fact that pleadings are not required in condemnation proceedings, does not affect the conclusiveness of a judgment thereon.

PLEADINGS—AMENDMENT—DILIGENCE—DISCRETION. It is discretionary to refuse leave to file amended answers at the trial, where two years had elapsed after demurrers were sustained to the new matter in the answers.

Certiorari to review orders of the superior court for Thurston county, Clifford, J., entered March 8, 1910, adjudging a public use and directing a jury to assess damages in a proceeding to condemn water rights for power purposes. Affirmed.

[1]Reported in 114 Pac. 427.

G. C. Israel, M. L. Pipes, Frank C. Owings, and *George H. Funk*, for relators.

Troy & Sturdevant and *A. J. Falknor*, for respondents.

Gose, J.—On the 10th day of July, 1907, the Olympia Light and Power Company, a public service corporation operating an electric street railway in the city of Olympia and in the town of Tumwater and between such points, and operating an electric light plant at such points, commenced two condemnation proceedings, one against the relators Schmidt, and the other against the Olympia Brewing Company. The purpose of these actions was to condemn and appropriate certain water rights in the Des Chutes river. On October 29, 1907, leave of court having been obtained, the relator, the Tumwater Power and Water Company, filed its complaint in intervention in both proceedings. It alleged that on July 9, 1907, it had a franchise from the town of Tumwater, granting it the use of the streets and alleys for laying mains and supplying the inhabitants of the town with electricity for lighting, heating, and power purposes, and also for supplying them with water; that it had an option to purchase the water rights of the defendants Schmidt, and that it had leased the water rights of the defendant, the Olympia Brewing Company, the same being the water rights sought to be appropriated; and that when the actions were commenced, it was proceeding diligently toward the utilization and application of the water to the privileges embraced in its franchise. The plaintiff interposed separate demurrers to the intervener's complaints, based upon two grounds; (1) that the intervener had no legal capacity to intervene; and (2) that its complaint does not state facts sufficient to constitute a cause of action, defense, or counterclaim. The demurrers were sustained, and the order entered thereon, omitting the title, is as follows:

"The demurrer of the plaintiff to the complaint herein in intervention of the Tumwater Power & Water Company hav-

ing been duly heard by the court it is now considered and adjudged that said demurrer be and the same is hereby sustained. Said intervener excepts and said exception is allowed. And said intervener declining and refusing to further plead, it is further adjudged and ordered that said complaint be and the same is hereby dismissed."

The defendants in the condemnation cases pleaded affirmatively substantially the same matter pleaded by the intervener. Separate demurrers were sustained to the new matter in each of the answers. The orders sustaining the several demurrers were entered on the 4th day of May, 1908. The intervener appealed from the orders of dismissal, and the appeals were dismissed. *Olympia Light & Power Co. v. Tumwater Power & Water Co.*, 55 Wash. 392, 700, 104 Pac. 778, 1135. The appeals were dismissed on the ground that the intervener's remedy was by writ of review and not by appeal. Writs of review were subsequently denied because the applications were not seasonably made. *State ex rel. Tumwater Power & Water Co. v. Superior Court*, 56 Wash. 287, 698, 105 Pac. 815, 816. On February 28, 1910, the motions of the defendants for leave to file amended answers were denied. On the 2d day of March, 1910, both cases proceeded to trial. At the close of the plaintiff's evidence, the relator corporation offered evidence to prove a state of facts substantially the same as those alleged in its complaint in intervention to which the demurrers had been sustained. The evidence was rejected, on the ground that the matters to which it related were *res judicata*. Separate orders were entered on March 3, 1910, declaring that the contemplated use for which the easements were sought to be appropriated by the plaintiff was a public use, and that the public interest requires the prosecution of the enterprise; and directing that a jury be empaneled to ascertain and determine the compensation to be made to the owners of the easements. The relators have applied for a writ of review in both cases, and they will be considered together.

The relators make two principal contentions: (1) that the trial court erred in refusing to hear the evidence of the relator Tumwater Power and Water Company; and (2) that the court abused its discretion in refusing to permit the defendants to file amended answers.

There was no error in rejecting the proffered evidence of the Tumwater Power and Water Company. A demurrer had been sustained to the complaint, alleging the same facts, and the complaint had been dismissed. It sought to review the order of dismissal, first by appeal and second by certiorari. Both remedies proved unavailing. The judgment is therefore final and conclusive. The order of dismissal put it out of the case.

"Judgment upon a demurrer or objection to a complaint that it does not state facts sufficient to constitute a cause of action, when final, determines the merits of the cause as between the parties and their privies." *Plant v. Carpenter*, 19 Wash. 621, 53 Pac. 1107.

"A final judgment rendered on demurrer which goes to the ground of recovery is a judgment on the merits and is *res judicata*." *Brechlin v. Night Hawk Mining Co.*, 49 Wash. 198, 94 Pac. 928, 126 Am. St. 863.

Where a demurrer to the merits of the petition is sustained and a judgment is entered in favor of the demurrant, such judgment, unless reversed, is as final and conclusive between the parties as if founded upon the verdict of a jury. The same rule applies where the demurrer contains several grounds, one of which goes to the merits of the case, as presented in the pleading demurred to. *Merrill v. Board of Com'rs of Ness County*, 7 Kan. App. 717, 52 Pac. 109. A general judgment or decree of dismissal, entered upon a demurrer based upon several grounds, some of which touch the merits of the cause of action, renders all the issues in the case *res judicata*, and constitutes a bar to any subsequent suit for the same cause of action. *Fowler v. Osgood*, 141 Fed. 20; *Indian Land & Trust Co. v. Shoenfelt*, 135 Fed. 484.

"Whenever a decree dismissing a bill in equity fails to restrict its own scope, the presumption, according to the great preponderance of decided cases, is that the issues raised by the proceedings have been disposed of on the merits, and they, therefore, become *res adjudicata.*" *Martin v. Evans*, 85 Md. 8, 36 Atl. 258, 60 Am. St. 292, 36 L. R. A. 218.

The same view is announced in *Foote v. Gibbs*, 1 Gray (Mass.) 412; *Hubbell v. United States*, 171 U. S. 203; *Carberry v. West Virginia R. Co.*, 44 W. Va. 260, 28 S. E. 694; *Hall v. Zeller*, 17 Ore. 381, 21 Pac. 192; *Hooven O. & R. Co. v. Featherstone's Sons*, 111 Fed. 81; *Billing v. Gilmer*, 60 Fed. 332; *House v. Mullen*, 22 Wall. 42; *Edgar v. Buck*, 65 Mich. 356, 32 N. W. 644.

In the recent case of *McPherson Bros. Co. v. Okanogan County*, 61 Wash. 239, 112 Pac. 267, quoting from *Olson v. Title Trust Co.*, 58 Wash. 599, 109 Pac. 49, we said that the general rule is that "in an action between the same parties, a judgment therein is *res judicata* as to all the points in issue, and also all points which might have been raised and adjudicated." The relators cite, in support of their contention, *Wills v. Pauly*, 116 Cal. 575, 48 Pac. 709; *White & Smith v. Savery*, 50 Iowa 515; *Rodgers v. Levy*, 36 Neb. 601, 54 N. W. 1080; *Sessions v. Sherwood*, 78 Mich. 234, 44 N. W. 263; *Hill v. Bryant*, 61 Ark. 203, 32 S. W. 506. In each of these cases it appeared that the judgment was not entered upon the merits.

The contention that the court had no jurisdiction to enter the order dismissing the complaint is without merit. The court had jurisdiction of the parties and the subject-matter, and had jurisdiction to pass upon the legal sufficiency of the intervener's complaint. That it may have erred in its judgment presents no jurisdictional question. The error, if any, should have been corrected by a timely application to this court for a writ of review. This course was not pursued.

The relator also suggests that it should not be bound by the judgment, because pleadings are not required on the part

of defendants in condemnation cases. As an intervener it would seem that it would be required to show some right in itself touching the subject-matter of the controversy before it would be permitted to intervene. Aside from this, however, it did plead, and the precise facts upon which it now relies were passed upon adversely to it, and it will not again be heard upon the same facts. *Northern Pac. & Puget Sound R. Co. v. Coleman*, 3 Wash. 228, 28 Pac. 514; *Ferry v. Ferry*, 9 Wash. 239, 37 Pac. 431; *Dawson v. Dawson*, 40 Wash. 656, 82 Pac. 937; *Eckert v. Schmitt*, 60 Wash. 23, 110 Pac. 635.

There was no error in refusing to permit the defendants to file amended answers. Almost two years elapsed after the demurrers were sustained to the new matter in the answers before application was made for leave to amend. The case was then ready for trial. Moreover it had been adjudged that the relator corporation had no interest in the controversy. This was the only question sought to be introduced by the amendments. The pleadings admit that the defendants are the owners of the water rights which the plaintiff seeks to appropriate.

The judgments are affirmed.

Fullerton, Parker, and Mount, JJ., concur.

[No. 9088. Department Two. March 24, 1911.]

DAVID McVAY, *Appellant*, v. JOE REESE, *Respondent*.[1]

PLEDGES — CORPORATE STOCK — FORECLOSURE — EVIDENCE — SUFFICIENCY. In an action to foreclose a pledge of corporate stock, it is error to grant a nonsuit where plaintiff's evidence showed that he sold the stock to defendant, but retained possession as collateral security for a note for the purchase price, which was due and unpaid; the burden of proving an affirmative defense being upon the defendant.

Appeal from a judgment of the superior court for King county, Frater, J., entered May 5, 1910, upon granting a nonsuit, dismissing an action on promissory notes and to foreclose a lien on corporate stock. Reversed.

James Kiefer, for appellant.

CROW, J.—This action was commenced by David McVay against Joe Reese, to recover principal and interest claimed to be due on three promissory notes and to foreclose a lien on twenty-five shares of capital stock of the Sherwood Logging Company, a corporation. At the close of plaintiff's evidence, the trial court sustained defendant's motion for a nonsuit, and entered an order of dismissal. The plaintiff has appealed.

The only question presented is whether the trial court erred in granting the nonsuit. Appellant testified that on January 7, 1905, he sold twenty-five shares of the capital stock of the Sherwood Logging Company, a corporation, to respondent, who in payment executed and delivered to appellant his promissory notes to the amount of $2,500; that appellant retained the certificate of stock as collateral security; that for the purpose of collection, appellant placed the notes with the Seattle National Bank where they were payable, and also deposited the stock with the bank, to be delivered by it to respondent on full payment of the notes; that $1,500 was paid, leaving $1,000 and interest due and unpaid; that the

[1]Reported in 114 Pac. 184.

stock was not delivered to respondent; that respondent did not expect its delivery until he took up the notes, and that the appellant never intended respondent should have the stock until the notes were paid. The stock certificate which is in evidence was originally issued to appellant, but when the sale was made, was assigned in blank by appellant, ready for delivery upon payment of the notes.

We fail to understand the theory upon which the nonsuit was granted. Respondent has filed no brief. Appellant's evidence which, upon motion for a nonsuit, must be accepted as true, shows that he sold the stock to respondent, who executed and delivered his notes in payment. The mere fact that the stock was retained by appellant as collateral security for the notes does not indicate any want of consideration, nor does it suggest any other reason why the notes should not be paid. The stock at all times since the sale has been ready for delivery upon payment of the notes. Respondent paid $1,500, which fact tends to establish appellant's contention that the consideration was to be paid and the notes satisfied prior to any delivery of the stock. Respondent pleaded an affirmative defense, to the effect that the remaining $1,000 was to be paid out of dividends on the stock, or not at all, and that no dividends had been declared, but this defense was denied, and the burden of sustaining it was upon the respondent who introduced no evidence for that purpose. Although it appears that the appellant retained the stock without first delivering it to the respondent, we think the evidence shows it was pledged as security, as completely as it would have been had it been delivered to the respondent and then returned to the appellant.

The motion for a nonsuit should have been denied. The judgment is reversed, and the cause remanded for a new trial.

Dunbar, C. J., Chadwick, and Morris, JJ., concur.

[No. 9178. Department Two. March 24, 1911.]

BENJAMIN F. WAKEFIELD *et al.*, *Appellants*, v. E. H. FISH *et al.*, *Respondents*.[1]

EVIDENCE—DEEDS—FRAUD—SUFFICIENCY. The evidence to establish fraud in the insertion of an exception to a covenant against incumbrances must be clear and convincing, and is insufficient where disinterested witnesses who were parties to the transactions testified that it was fully understood and agreed to.

MORTGAGES—BONA FIDES—RECORD TITLE—NOTICE. A mortgagee is not charged with the mortgagor's notice of an outstanding equity in a third person, where there was nothing to show that he did not rely on the record title.

MORTGAGES—APPLICATION OF PROCEEDS — EQUITIES— SUPERIORITY. One having notice that a certain mortgage was to be made to raise money to satisfy his undisclosed equity in the property, cannot charge the mortgagee with the application of the proceeds where he failed to give the mortgagee direct notice of his claim thereto, even if the mortgagee had notice of the mortgagor's agreement to so apply the proceeds.

MORTGAGES—RECORD—PRIORITIES. A purchase money mortgage does not, under our recording acts, take priority over others unless they concur in time or the priorities are controlled by contract or equities between the several mortgagees.

MORTGAGES — FORECLOSURE — SUCCESSIVE FORECLOSURES — JUNIOR MORTGAGES. Where a first mortgage had been foreclosed, establishing the priorities and the amount of the respective debts, without making junior mortgagees parties to the suit, it is proper to dismiss a subsequent action to foreclose the junior mortgage; since the right of redemption secures all the rights they would have by their foreclosure.

Appeal from a judgment of the superior court for Stevens county, S. Douglas, Esq., judge *pro tempore*, entered June 27, 1910, dismissing an action for equitable relief, upon a challenge to the sufficiency of the evidence. Affirmed.

R. L. Edmiston, for appellants.

Jackson & Bailey and *E. D. Germain*, for respondents.

[1]Reported in 114 Pac. 180.

CHADWICK, J.—On September 1, 1908, appellants owned 160 acres of land in Spokane county, Washington. Desiring to dispose of this property, Mr. Wakefield went to Spokane and there came in contact with a Mr. Michener, a real estate agent, who at the time had nothing to offer that was attractive to Mr. Wakefield. After a day or two he was introduced to a Mr. Schmidt, who had some real property and a small stock of merchandise at Hayford. Mr. Schmidt did not care to trade his land for Wakefield's property, and Mr. Michener brought respondents E. H. Fish and his wife Grace into the deal. They owned certain town lots in the city of Spokane. It was then agreed that Fish and wife would take Wakefield's property, that Schmidt would take the lots in Spokane, and Wakefield would take the property and stock of goods at Hayford; and deeds were executed accordingly. In the adjustment of the trade, it was estimated that Schmidt had an equity of about $2,250 in his property. Upon further consideration it was agreed that this equity did not exceed $1,000, and to secure the difference it was agreed that E. H. Fish and his wife would make a deed, conveying the property he had just bought from Wakefield, to Schmidt; this deed to be held in escrow by Mr. Michener subject to a collateral agreement that Fish would pay $500 to Schmidt on January 1, 1909, and $500 on July 1, 1909, and in the event that such sums were not paid, the deed was to be delivered to Schmidt, and he should thenceforth be the owner of the property. Schmidt's rights in the property and his interest in the contract were assigned to the Wakefields on December 12, 1908, and they are now seeking to enforce their rights thereunder.

The assignment was recorded February 13, 1909. Neither one of the payments was made under this collateral agreement. On October 1, 1908, E. H. Fish and wife executed a mortgage on the Wakefield property in favor of Fred Fish, father of E. H. Fish, for $1,500, evidenced by two notes, one of date August 8, 1908, for $900, and the other of date October 1, 1908, for $600. This mortgage was foreclosed in April, and

the property bid in by Fred Fish for $1,689.82, which is conceded to be the amount due on the judgment. In July, E. H. Fish and wife being still in default, Mr. Wakefield, as assignee of the escrow agreement, demanded the deed from Mr. Michener, and having obtained it, filed it for record. An extension of the abstract of title disclosed the Fred Fish mortgage, its foreclosure, and the sale of the property; whereupon appellants brought this action, asking that the Fred Fish mortgage be held to be fraudulent as to them, that their escrow deed be decreed to be a mortgage and first in time, and for such other relief as they might, under a full disclosure of the facts, be entitled to.

As a premise to our conclusions of law, the following facts are pertinent: At the time the deed and escrow agreement were executed, it was understood that E. H. Fish and Grace Fish would undertake to get a loan on the property and pay off the $1,000 in the immediate future, and Mr. Michener and Mr. Schmidt undertook to and had made some arrangements for a loan, pending which E. H. Fish told them that it would be unnecessary for them to go further, as he had arranged to get a loan from his father at Colville. The parties had, however, with seeming intent to authorize the placing of a loan on the property to meet the debt due from E. H. Fish and wife to Schmidt, written into the mortgage (the escrow deed) that the premises "are free from all incumbrances except whatever incumbrance there may be by July 1, 1909." It is asserted by appellants that this clause was fraudulently inserted; that Fred Fish had notice of the escrow agreement in that E. H. Fish was his agent, and that he is thus charged with notice of the rights of Schmidt and his assignees, these appellants; and further that the court erred in refusing to determine the priorities between the liens of the parties, and in refusing to decree a foreclosure of the deed mortgage.

Mr. Michener, who prepared the papers, was the agent of all parties to the transaction, and a careful reading of the evidence convinces us that the testimony is wholly insufficient

to charge him or E. H. Fish with any fraudulent purpose or design in inserting the exception to the warranty clause. On the contrary, the evidence indicates that it was the understanding of all parties that a mortgage would be put upon the land. Schmidt and Michener had arranged for one, when they were halted by E. H. Fish as before stated. Upon this very point Mr. Schmidt, although disclaiming knowledge of the exception to the warranty clause, said:

"Mr. Fish and I had agreed on the escrow agreement and the deed was to go in escrow and he was to have the privilege of putting a mortgage on the property to get the money to pay up the escrow. That was my understanding of it."

Mr. Michener says that, after he had written the clause in the deed, he stated that it was unnecessary because Fish would have the right to make the mortgage in any event. But if it should be held otherwise, the testimony offered to vary an instrument so solemn as a deed must be clear and convincing, and the record here is wholly insufficient to overcome the presumption of integrity attending the instrument. This has been so frequently held that a collection of the cases would serve no purpose.

The testimony shows that an attorney asked for permission, and was allowed, to inspect the escrow agreement and deed while it was still in Michener's possession. Whether he was acting as the agent of Fred Fish or of E. H. Fish is not made clear. Upon the theory that such knowledge as he obtained from the escrow agreement would bind Fred Fish, appellants rely on *Dormitzer v. German Sav. & Loan Soc.*, 23 Wash. 132, 62 Pac. 862. It is said:

"If Fred Fish relied upon the statement of his son E. H. Fish with reference to the disputed clause, then E. H. Fish became his agent, and Fred Fish was charged with knowledge of all the rights of the parties possessed by E. H. Fish."

Without undertaking to analyze the case relied on, it is sufficient to say that this theory cannot be sustained. There is nothing even tending to show that Fred Fish had any knowl-

edge of the previous transactions of the parties, or that he did not rely upon the record title which was in E. H. Fish; or if it be held that he did have notice of the escrow agreement and the exception to the warranty clause in the escrow deed under the facts as we have disclosed them, he had a right even then to take the mortgage. For if the equities are to be measured, Schmidt, having notice of the fact that E. H. Fish was about to make a mortgage in favor of his father, might have given direct notice of his equities and his claim to the proceeds of the loan. Not having done so, he cannot charge Fred Fish with its wrongful application. From the whole record we are convinced that the mortgage was within the contemplation of all the parties, and there being no evidence showing any fraud, we hold that the trial judge was correct in his conclusion that the rights of the appellants were subordinate to those of Fred Fish.

This conclusion disposes of the question of priorities, and that will need no further discussion, unless heed is given to the assertion of appellants that their escrow agreement and deed was in fact a purchase money mortgage, and for that reason would take precedence over the mortgage of Fred Fish. To sustain this contention appellants rely upon *Bisbee v. Carey*, 17 Wash. 224, 49 Pac. 220, and *Skeel v. Christenson*, 17 Wash. 649, 50 Pac. 466. Under our recording acts the question of priority between one holding a purchase money mortgage and another cannot be raised, unless the mortgages concur in time or the priorities are controlled by some contract or equities arising between the several mortgagees. The doctrine, if admitted at all, would not apply as against one who, as we have held, had a right to take the mortgage although he had notice of the escrow agreement, and who had in addition the record title upon which he might rely.

Appellants' final contention is that, although their mortgage be held to be a second lien, the court erred in refusing a decree of foreclosure, asserting the familiar rule of law that

a junior mortgagee can maintain a foreclosure proceeding without redeeming or offering to redeem. This rule cannot be seriously questioned, but where, as in this case, the prior mortgage has been foreclosed, there can be no reason for the application of the rule. The foreclosure proceeding established the priority of the Fred Fish mortgage as against all parties except these appellants. The most they can claim is that they were not made parties to the suit, and thus have a right of redemption. This the lower court held that they might still exercise. Another foreclosure would be futile. The priorities between the parties have been established and the amount of their respective debts ascertained, and a redemption would secure to appellants all the rights they would have had had they been parties to the foreclosure proceeding.

Affirmed.

DUNBAR, C. J., CROW, and MORRIS, JJ., concur.

[No. 9322. Department One. March 25, 1911.]

J. F. DONNELLY, *Respondent*, v. FRANK W. HOBBS *et al.*, *Appellants*.[1]

VENDOR AND PURCHASER—RESCISSION BY VENDOR—FAILURE TO PERFORM—EVIDENCE—SUFFICIENCY. Upon a direct conflict in the evidence of the two parties as to whether plaintiff intended to give defendant a contract of sale, or only to list property for sale, a cancellation of a contract to sell is warranted where it appears that the defendant had paid nothing, had requested an extension of time, and had not offered to perform within the time required by the contract.

Appeal from a judgment of the superior court for Spokane county, Webster, J., entered July 13, 1910, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to quiet title. Affirmed.

Danson & Williams, for appellants.

P. C. Shine, for respondent.

[1]Reported in 114 Pac. 429.

MOUNT, J.—The plaintiff brought this action to remove a cloud from the title to certain real estate in Spokane county. The defendants filed an answer and cross-complaint, setting up an alleged contract with plaintiff, by which plaintiff agreed to sell the said real estate to defendant Frank W. Hobbs, and prayed for specific performance of this contract. The plaintiff for reply denied the contract as alleged by the defendant, and alleged that the writing was a listing of the land for sale with the defendant as real estate broker, and that no agreement of sale was intended by the parties. Upon these issues the cause was tried to the court, and resulted in a decree as prayed for in the complaint. The defendants have appealed.

The facts are that, on August 31, 1906, the plaintiff was the owner of the lots in question. On that day the defendant Frank W. Hobbs, who was engaged in the real estate business, solicited the plaintiff to list the lots with him for sale. Plaintiff agreed to do so, and thereafter defendant wrote out a contract, which plaintiff signed without reading it, as follows:

"Spokane, Washington, August 31, 1906.

"I, the undersigned, J. F. Donnelly, for the sum of one ($1) dollar and other considerations, agree to sell to Frank W. Hobbs lots 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, and 23, block 2, First Addition to West Riverside Addition to Spokane Falls (Now Spokane), Spokane county, Washington. Purchase price seven hundred ($700) dollars cash, sale to be consummated on or before September 15, 1906, and to furnish abstract and good title.

"(Signed) J. F. Donnelly."

About a week after this contract was made, plaintiff notified defendant that he (plaintiff) had sold the property; whereupon defendant denied the right of plaintiff to sell, and immediately placed the contract of record in the county auditor's office. On September 15, 1906, the day when the sale was to be consummated under the contract, the defendant requested an extension of time, which the plaintiff refused to give. Nothing more appears to have been done by either

party until January 17, 1910, when plaintiff brought this action to remove the cloud caused by the record of the contract.

There were but two witnesses examined at the trial. The plaintiff testified in his own behalf, in substance, that, on or about August 31, 1906, the defendant came to him in his shop, while he was at work as a blacksmith, and requested him to fix a price on the lots and list them with him for sale; that after some talk plaintiff agreed to do so; that the defendant then wrote on a piece of paper and told plaintiff that the writing was a mere matter of form and was only a listing of the property for sale; that plaintiff, relying upon the statement of the defendant and without reading the paper, signed it; that no consideration at all was paid therefor; that about a week later he notified defendant that he (plaintiff) had made a sale of the lots, whereupon defendant claimed that he had a contract for the purchase of the lots, and the plaintiff had no right to sell. The plaintiff disputed the contract, and afterwards learned from the record the purport of the writing; that defendant at no time made any tender of the purchase price to him, and on September 15, 1906, requested an extension of time, which plaintiff refused to give. The defendant testified, in substance, that the contract was a contract of sale, as it purported to be upon its face; that he paid plaintiff the one dollar mentioned in the contract; that the plaintiff read the contract and understood it at the time he signed it; and that on September 15, 1906, he tendered the purchase price to plaintiff, which tender was refused. The trial court apparently believed the testimony of the plaintiff, and was not impressed with that of the defendant, for findings were made in favor of the plaintiff substantially as he had testified.

If we were to find that this contract was one of sale and not of listing for sale, there is still sufficient in the evidence to justify the court in finding that the defendant had not performed, or offered to perform, within the time provided in the

contract. The fact that he requested an extension of time on the last day is a strong circumstance supporting that finding. It is, of course, not conclusive, but taken in connection with the positive evidence of the plaintiff, is sufficient to justify the finding. Where the testimony is conflicting, as it was in this case, we are not disposed to disturb the findings of the trial court.

The judgment must therefore be affirmed.

DUNBAR, C. J., PARKER, and GOSE, JJ., concur.

FULLERTON, J., concurs in the result.

[No. 9189. Department One. March 25, 1911.]

EDWIN L. GAUTHIER, *Appellant*, v. PETER MORRISON *et al.*, *Respondents*.[1]

EJECTMENT—TITLE OF PLAINTIFF. In ejectment, the plaintiff must recover on the strength of his own title, and not on the weakness of the defendant's.

PUBLIC LANDS—CLASSIFICATION—HOMESTEADS—RIGHTS OF ENTRYMAN. The rights of one who goes upon vacant, unsurveyed public land subject to settlement under the homestead laws, with intent to enter the same, depends upon the character of the land; and land erroneously classified by the government as a lake is not subject to homestead entry.

PUBLIC LANDS—SURVEY AND CLASSIFICATION—JURISDICTION OF COURTS—LAND DEPARTMENT—AUTHORITY. Under the Federal statutes the exclusive control of the public lands and surveys and the correction of the same being vested in the land department, the state courts have no jurisdiction of an action to recover possession of alleged lands, erroneously and fraudulently surveyed and classified by the government as a lake, the United States not being a party to the action and no remedy having been sought in the land department.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered May 31, 1910, upon sustaining a demurrer to the complaint, dismissing an action of ejectment. Affirmed.

[1]Reported in 114 Pac. 501.

Skuse & Morrill and *F. H. McDermont*, for appellant.

Voorhees & Canfield, for respondents.

MOUNT, J.—The plaintiff brought this action, seeking to have the court adjudge that he is entitled to possession of the land described in the complaint, and that the defendants have no right to possession thereof. The defendants demurred to the complaint, upon the ground that the court had no jurisdiction of the subject-matter, and that the complaint did not state facts sufficient to constitute a cause of action, and upon other grounds. The trial court sustained this demurrer, and the plaintiff electing to stand upon the allegations of his complaint, the action was dismissed. Plaintiff appeals.

The complaint alleged:

"That in the year 1877 the government of the United States caused to be surveyed townships twenty-four (24) and twenty-five (25) north of range forty-five (45) East Willamette Meridian, and the same were surveyed during said year by a surveyor employed for that purpose by the government of the United States under a contract entered into between the United States and said surveyor, and such surveyor in making said survey, among other instructions issued to him by the government of the United States in regard to his duties in making such survey, was instructed as follows: 'You are also to meander in manner aforesaid all lakes and deep ponds of the area of twenty-five acres, and upwards; also navigable bayous; shallow ponds readily to be drained or likely to dry up are not to be meandered'; said instructions being a part of the manual of instructions relating to the public surveys, prepared at the general land office and bearing date February 22, 1875; that notwithstanding such instructions and in violation of his duty and of his contract in making the survey of said townships twenty-four and twenty-five north, of range forty-five (45) E. W. M., the said surveyor failed and neglected to include within the survey of said townships all of the land therein, and failed to survey all of the lands within said townships, but did meander and failed to survey a portion of sections four (4) and five (5) in said township twenty-four and a portion of sections twenty (20), twenty-eight (28), twenty-nine (29), thirty-two (32) and thirty-

three (33) in said township twenty-five, and in such survey wrongfully, erroneously and fraudulently designated the lands in said sections lying and being within the meandered lines as made by such survey, as a lake, and by so doing wrongfully, erroneously and fraudulently designated by means of such survey an area of land within such townships in a contiguous body, containing approximately twelve hundred (1,200) acres and lying and being within said meandered lines as aforesaid, as a lake, and wrongfully, erroneously and fraudulently failed and neglected to survey the same, or any part thereof, and no part thereof has since been surveyed by the government of the United States, and has never been alienated or disposed of by the government of the United States, and all of the said lands within the said meandered lines ever since have been and are now unsurveyed government lands belonging to the government of the United States as a part of its public domain and subject to, and open for, settlement under the homestead laws of the United States; that the said lands lying and being within the meandered lines as made by the survey of said townships and said sections as aforesaid, were not at the time of such survey and not now, and never have been a lake covered by a permanent body of water, and were at the time of such survey, and for a long time prior thereto, partially subject to overflow during the wet seasons of the year, with none or little water thereon during the dry season of the year, the most of it hay meadow, upon which meadow grasses and other kind of grasses suitable for hay grew each season, with some swampy or marshy portions at or near the center, upon the most part of which said swampy or marshy portions cat-tails, tules, bullrushes and other kinds of swamp vegetation grew each season, and all thereof likely to dry up and susceptible of being readily and easily drained, and at the present time, and for several years last past, all of the lands within said meander lines as made by said survey are good agricultural lands susceptible of cultivation and susceptible of being used, occupied and farmed and grown to hay, grain and other crops the same as any other good agricultural land; that on the 30th day of October, 1909, this plaintiff, in good faith as a homestead settler, and for the purpose of thereafter making a homestead entry thereon and acquiring title thereto from the government of the United States under the homestead laws, made settlement upon that part and portion of the lands

lying and being within the meandered lines as made and shown by the survey as hereinbefore set forth, which, when surveyed, would be described as follows, to wit: The northeast quarter of the southwest quarter (N. E. ¼ S. W. ¼); part of the northwest quarter of the southeast quarter (N. W. ¼ S. E. ¼) and the southwest quarter of the southeast quarter (S. W. ¼ S. E.¼) of section thirty-three (33), township twenty-five (25) north, of range forty-five (45) East Willamette Meridian, containing seventy-five (75) acres more or less."

The complaint then alleges that the plaintiff is a qualified entryman under the homestead laws of the United States, and that at the time he settled upon the said land no one resided on any part thereof, but that defendants have heretofore wrongfully occupied and cultivated the said lands, and are now wrongfully attempting to occupy and control the same, and have unlawfully prevented the plaintiff from occupying the lands.

It is apparent that this is a possessory action, and while the complaint alleges a right in the plaintiff, this allegation is but a conclusion. Before the plaintiff may be adjudged to have the right of possession, it must appear that the land sought is subject to the right which the plaintiff demands. He can obtain no right to the land or its possession by reason of the fact that the defendants have no right or are trespassers. As we said in *George v. Columbia & Puget Sound R. Co.*, 38 Wash. 480, 80 Pac. 767:

"Whatever may be the technical law on this subject, it is unimportant here for the reason that, in this kind of an action, the plaintiff, if he prevails at all, must prevail upon the strength of his own title, and not upon the weakness of that of his adversary. The basis of this complaint is a possessory right."

Appellant's right to possession is necessarily based upon the character of the land; that is, if the land is vacant, unsurveyed public land, subject to settlement and possession by the plaintiff under the homestead laws of the United States, then he has shown a right, otherwise, he has none. The complaint recites

that, in the year 1877, the government of the United States caused townships 24 and 25, north, range 45, to be surveyed by a surveyor employed for that purpose; that such surveyor did meander the land in dispute, and wrongfully and fraudulently designated such lands as a lake; that said lands within the meandered lines were not, and never have been, a lake covered by a permanent body of water, but were swampy or marshy at or near the center, and were susceptible of being readily and easily drained, and are good agricultural land susceptible of being occupied, cultivated, and farmed. It is at once apparent from these allegations that the government, through its land department, has classified these lands as a lake, and therefore the land is not subject to settlement under the homestead laws; and that the object of this action is to have the state courts declare that the government, through fraud of its agent, holds the land as water, when in fact it is land which is unsurveyed. The government is not a party to this action, and of course such judgment, if finally made in this case, would not be binding upon the government. It has been held, since early times, that the exclusive control of the public lands rests in the interior department, and remains there until patent has issued and title has passed from the government; and that there is no jurisdiction in the courts to control either the public lands or the action of the government in connection therewith, until patent has issued and the land ceases to be public lands. Until that time, all questions affecting the status of government land rest exclusively in the government. The question then is, have the state courts jurisdiction to determine questions involving the character or disposition of land by the United States, or the action of the interior department in regard thereto?

Section 453, U. S. Revised Statutes, provides:

"The commissioner of the general land office shall perform, under the direction of the secretary of the interior, all executive duties appertaining to the surveying and sale of the public lands of the United States, or in anywise respecting

such public lands, and, also, such as relate to private claims of land, and the issuing of patents for all grants of land under the authority of the government."

Section 2218, Id., provides:

"The secretary of the interior shall take all the necessary measures for the completion of the surveys in the general surveying-districts for which surveyors-general have been, and may be, appointed."

Section 2219 provides:

"In all cases where, as provided in the preceding section, the field-notes, maps, records, and other papers appertaining to land-titles in any state are turned over to the authorities of such state, the same authority, powers, and duties in relation to the survey, resurvey, or subdivision of lands therein, and all matters and things connected therewith, as previously exercised by the surveyor-general, whose district included such state, shall be vested in, and devolve upon, the commissioner of the general land-office."

And section 2395 provides:

"(7) Every surveyor shall note in his field-book the true situations of all mines, salt licks, salt springs, and mill-seats which come to his knowledge; all water-courses over which the line he runs may pass; and also the quality of the lands."

The act of Congress of March 31, 1909 (Supp. to Fed. Stats. Ann. 563), provides:

"That the secretary of the interior may, in his discretion, cause to be made as he may deem wise under the rectangular system now provided by law, such resurveys or retracements of the surveys of public lands as, after full investigation, he may deem essential to properly mark the boundaries of the public lands remaining undisposed of: *Provided*, That no such resurvey or retracement shall be so executed as to impair the *bona fide* rights or claims of any claimant, entryman, or owner of lands affected by such resurvey or retracement: *Provided, further*, That not to exceed five per cent of the total annual appropriation for surveys and resurveys of the public lands shall be used for the resurveys and retracements authorized hereby."

It is not difficult, upon the foregoing legislation, to reach the conclusion that the courts of a state cannot undo what the secretary of the interior has done in the course of his administration of the public lands, or decree rights of private parties in the land which rest upon the necessity of the secretary of the interior undoing whatever he has already done and doing something different. In *Cragin v. Powell*, 128 U. S. 691, the supreme court of the United States said:

"That the power to make and correct surveys of the public lands belongs to the political department of the government and that, whilst the lands are subject to the supervision of the general land office, the decisions of that bureau in all such cases, like that of other special tribunals upon matters within their exclusive jurisdiction, are unassailable by the courts, except by a direct proceeding; and that the latter have no concurrent or original power to make similar corrections, if not an elementary principle of our land law is settled by such a mass of decisions of this court that its mere statement is sufficient."

A large number of decisions are therein cited to support this statement, and the court then proceeds:

"The reason of this rule, as stated by Justice Catron in the case of *Haydel v. Dufresne*, is that great confusion and litigation would ensue if the judicial tribunals, State and Federal, were permitted to interfere and overthrow the public surveys on no other ground than an opinion that they could have the work in the field better done and divisions more equitably made than the department of public lands could do."

This declaration of lack of jurisdiction in the courts prior to the issuance of patent has been many times affirmed by the supreme court of the United States: *Stoneroad v. Stoneroad*, 158 U. S. 240; *Russell v. Maxwell Land Grant Co.*, 158 U. S. 253; *Knight v. United States Land Association*, 142 U. S. 161; *Kirwan v. Murphy*, 189 U. S. 35.

In *Kirwan v. Murphy*, *supra*, the court said:

"The land department must necessarily consider and determine what are public lands, what lands have been surveyed, what are to be surveyed, what have been disposed of, what re-

main to be disposed of, and what are reserved. The department has held that the land lying between the alleged meander line and the lake, some 1,200 acres, is government land, and has ordered it to be surveyed. *In re Burns*, 20 L. Dec. 28, 295, 23 L. Dec. 430. The execution of that order was restrained by the preliminary injunction herein, and that has been made perpetual by the decree. We are confronted on the threshold with two objections to the maintenance of this bill; namely, the want of jurisdiction in equity, and the want of jurisdiction thus to interfere with executive administration. . . . The administration of the public lands is vested in the land department, and its power in that regard cannot be divested by the fraudulent action of a subordinate officer, outside of his authority, and in violation of the statute. *Whiteside v. United States*, 93 U. S. 247; *Moffat v. United States*, 112 U. S. 24; *Hume v. United States*, 132 U. S. 406, 414. The courts can neither correct nor make surveys. The power to do so is reposed in the political department of the government, and the land department, charged with the duty of surveying the public domain, must primarily determine what are public lands subject to survey and disposal under the public lands laws. Possessed of the power, in general, its exercise of jurisdiction cannot be questioned by the courts before it has taken final action. *Brown v. Hitchcock*, 173 U. S. 473."

In *Michigan Land & Lumber Co. v. Rust*, 168 U. S. 589, the supreme court said:

"Generally speaking, while the legal title remains in the United States, the grant is in process of administration and the land is subject to the jurisdiction of the land department of the government. It is true a patent is not always necessary for the transfer of the legal title. Sometimes an act of congress will pass the fee. . . . Sometimes a certification of a list of lands to the grantee is declared to be operative to transfer such title, . . . but wherever the granting act specifically provides for the issue of a patent, then the rule is that the legal title remains in the government until the issue of the patent . . .; and while so remaining the grant is in process of administration, and the jurisdiction of the land department is not lost . . . And, again, on page 181 is this

language: 'The secretary is the guardian of the people of the United States over the public lands. The obligations of his oath of office oblige him to see that law is carried out, and that none of the public domain is wasted or is disposed of to a party not entitled to it. He represents the government, which is a party in interest in every case involving the surveying and disposal of the public lands.' . . . This jurisdiction extends to the ordering of new surveys whenever in the judgment of the department there has been error or fraud in those already made. *Cragin v. Powell*, 128 U. S. 691. In *Tubbs v. Wilhoit*, 138 U. S. 134, 143, the court quoted with approval this passage from a letter of the secretary of the interior: 'There can be no doubt but that under the act of July 4, 1836, reorganizing the general land office, the commissioner has general supervision over all surveys, and that authority is exercised whenever error or fraud is alleged on the part of the surveyor general.' And in *New Orleans v. Paine*, 147 U. S. 261, the question was presented as to the power of the department to order a new survey, and on page 206 the rule was thus stated: 'If the department was not satisfied with this survey, there was no rule of law standing in the way of its ordering another. Until the matter is closed by final action, the proceedings of an officer of a department are as much open to review or reversal by himself, or his successor, as are the interlocutory decrees of a court open to review upon the final hearing.' So, notwithstanding that a survey had been made and that such survey indicated that the land in controversy was swamp land, and, therefore, passing under the act of 1850 to the state of Michigan, it was within the power of the land department, at any time prior to the issue of a patent, of its own motion, to order a resurvey and correct by that any mistakes in the prior survey."

In *Brown v Hitchcock*, 173 U. S. 473, the supreme court of the United States said:

"In this case the record disclosed no patent, and therefore no passing of the legal title. Whatever equitable rights or title may have vested in the state, the legal title remained in the United States. Until the legal title to public lands passes from the government, inquiry as to all equitable rights comes within the cognizance of the land department. In

United States v. Schurz, 102 U. S. 378, 396, which was an application for a mandamus to compel delivery of a patent, it was said: 'Congress has also enacted a system of laws by which rights to these lands may be acquired, and the title of the government conveyed to the citizen. This court has, with a strong hand, upheld the doctrine that so long as the legal title to these lands remained in the United States, and the proceedings for acquiring it were as yet *in fieri*, the courts would not interfere to control the exercise of the power thus vested in that tribunal. To that doctrine we still adhere.' . . . The dissent announced by the chief justice only emphasizes the proposition laid down in the opinion as heretofore quoted, that so long as the legal title remains in the government, all questions of right should be solved by appeal to the department and not to the courts."

In *Oregon v. Hitchcock*, 202 U. S. 60, the same court said:

"Again, it must be noticed that the legal title to all these tracts of land is still in the government. No patents or conveyances of any kind have been executed. There has been no finding or adjudication by the land department that the lands referred to were swamp or overflowed on March 12, 1860. Under those circumstances it is not a province of the courts to interfere with the land department in its administration. So far as a grant of swamp lands is claimed, it must be held that the grant is in process of administration, and, until the legal title passes from the government, inquiry as to equitable rights comes within the cognizance of the land department. Courts may not anticipate its action, or take upon themselves the administration of the land grants of the United States."

The same rule has been followed by this court in *Columbia Canal Co. v. Benham*, 47 Wash. 249, 91 Pac. 961, 125 Am. St. 901.

We are clear, therefore, that the state courts have no jurisdiction of this case under the facts alleged, and that the remedy of the appellant, if he has any, is in the land department of the United States government. The complaint showing that the land is held as water by the government, it is not subject to homestead entry. The complaint is therefore insuf-

ficient to show a right of possession in the plaintiff, and the judgment must be affirmed.

DUNBAR, C. J., PARKER, FULLERTON, and GOSE, JJ., concur.

[No. 9169. Department One. March 27, 1911.]

THE STATE OF WASHINGTON, *Respondent*, v. CHARLES E. RAY, *Appellant*.[1]

INDICTMENT AND INFORMATION—SUFFICIENCY—DEMURRER. The sufficiency of an information must be determined on demurrer by what appears on its face, and error in the admission of evidence thereafter does not affect its sufficiency.

CRIMINAL LAW—DIFFERENT ACTS—TRIAL—ELECTION—RECEIVING STOLEN GOODS. Under an information charging the larceny of fifty bushels of wheat during a certain month, and Rem. & Bal. Code, § 2601, making it larceny to knowingly buy or receive stolen property, it is competent to show that the accused offered one B. and his associates one dollar and a half a sack for all wheat they would take from cars and put in his barn, and thereafter on three different occasions during said month, he paid B. and his associates for wheat stolen by them and put in his barn; and the prosecution need not elect between the different deliveries, since it was all part of one continuous transaction.

LARCENY—GRAND LARCENY—CONTINUOUS TRANSACTION. Where the purchase of stolen property on three different occasions was pursuant to one offer and all part of one transaction, it amounts to grand larceny, under Rem. & Bal. Code, § 2605, if the total value was over twenty-five dollars, notwithstanding there might have been a conviction of petit larceny for any one of the three acts (GOSE and FULLERTON, JJ., dissenting).

CRIMINAL LAW—EVIDENCE OF ACCOMPLICES—SUFFICIENCY. A conviction of larceny by the receipt of stolen goods may be had upon the testimony of the accomplices who stole the same.

RECEIVING STOLEN GOODS—EVIDENCE—OWNERSHIP—SPECIAL PROPERTY. A conviction of larceny by the receipt of wheat stolen from railway cars may be had without evidence that the railway company owned the wheat, in view of Rem. & Bal. Code, § 2303, subd. 16, providing that any one having a general or special interest shall be deemed the owner; also where it was shown that the defendant knew the wheat was stolen.

[1]Reported in 114 Pac. 439.

Appeal from a judgment of the superior court for Whitman county, Canfield, J., entered July 8, 1910, upon a trial and conviction of larceny. Affirmed.

J. T. Brown, for appellant.

Charles L. Chamberlin (*Paul Pattison*, of counsel), for respondent.

MOUNT, J.—The appellant was convicted and sentenced under an information charging him as follows:

"The said Charles E. Ray in the county of Whitman in the state of Washington, during the month of December, 1909, then and there being, did, with intent to defraud the owner of the property hereinafter mentioned, wilfully, knowingly, unlawfully, and feloniously, unlawfully obtain, appropriate, buy, receive, conceal and withhold fifty bushels of wheat of the value of $50, the said wheat then and there being the property of the Northern Pacific Railway Company, a corporation. The said Charles E. Ray, when he did so unlawfully obtain, appropriate, buy, sell, conceal and withhold said wheat as aforesaid, knew that the said wheat was the property of the said Northern Pacific Railway Company, a corporation, and had been stolen from said Northern Pacific Railway Company, a corporation, contrary to the form of the statute," etc.

It is argued that the trial court erred in overruling the defendant's general demurrer to this information.

If we understand appellant's position, it is not that the complaint is insufficient upon its face, but that the court permitted the state to prove that the defendant had purchased the fifty bushels of wheat from different persons upon three different occasions. It is plain that, if it was error for the court to admit such evidence, this did not affect the sufficiency of the information, for the sufficiency of the information is determined by what appears upon its face, and not otherwise. The information is clearly sufficient under the rule in *State v. Druxinman*, 34 Wash. 257, 75 Pac. 814.

The witness Fred Barton, called by the state, testified, in

substance, that upon December 11, 1909, he remarked to defendant about the railway company having lots of wheat on the side track, and defendant said, "I will give you a dollar and a half per sack for all wheat put in my barn;" that on that night the witness and one Jesse Grant took ten sacks of wheat from the car and put the wheat in defendant's barn, and defendant paid the witness $15 for the wheat; that on December 18, 1909, the same two persons took five more sacks of wheat which they put into defendant's barn, and defendant paid them $7.50 therefor; that on December 23, 1909, the witness and one Joseph Miller took twelve more sacks of wheat which they put into defendant's barn, and defendant paid them $18 therefor. The witnesses Grant and Miller also testified to the same effect. This evidence was objected to upon the ground that it was incompetent, irrelevant and immaterial, which objections were overruled; and then counsel for defendant moved the court to require the state to elect upon which of these offenses it relied, for the reason that each offense was a separate offense committed upon different dates by different persons, and each of itself amounted to petit larceny, and that the three offenses could not be tacked together to make a crime of grand larceny. These objections were overruled by the court. The statute provides, at § 2601, Rem. & Bal. Code:

"Every person who, with intent to deprive or defraud the owner thereof— . . . or . . . who, knowing the same to have been so appropriated, shall . . . buy, sell, receive or aid in concealing or withholding any property wrongfully appropriated . . . in such manner as to constitute larceny under the provisions of this act . . . shall be guilty of larceny."

And at § 2605, Rem. & Bal. Code:

"Every person who shall . . . buy, sell, receive, conceal or withhold in any manner specified in § 2601— . . . Property of the value of more than twenty-five dollars, in any manner whatever, shall be guilty of grand larceny . . . Every other larceny shall be petit larceny . . ."

Appellant now insists that the evidence should have been excluded, or that the state should have been required to elect upon which offense it would proceed; and that the court erred in permitting the conviction of grand larceny to stand.

The trial court was evidently of the opinion that the taking of the wheat by Barton and his associates and placing it in defendant's barn, upon several different occasions, constituted one continuous transaction, and therefore that the purchase by the defendant was also one continuous transaction. The information charged that the defendant "during the month of December, 1909, . . . did . . . buy, receive, conceal and withhold fifty bushels of wheat of the value of $50." The proof showed that at about that time, the defendant said to Barton, "I will give you a dollar and half per sack for all wheat put in my barn;" that on the nights of the 11th, 15th and 23d days of December, 1909, Barton and his associates put into the barn the wheat in question. We have no doubt that, if Barton had taken one or two sacks per day until the total amounted to the value of $25 or more, and had received pay therefor at one time, the result would have been one continuous transaction. The mere fact that on the 11th day of December, Barton stole and placed ten sacks of wheat in defendant's barn; that on the 18th he placed five sacks more there, and on the 23d he placed twelve more sacks therein, and received his pay therefor at the dates named, does not change the character of the act from a continuous transaction to separate transactions; because the separate transactions were parts of the one continuous whole conceived and carried on as such. We have no doubt that the defendant might have been convicted of petit larceny for each transaction separately. But this, we think, does not show that the several transactions were necessarily separate and not continuous. The fact that the defendant said to Barton, "I will give you a dollar and a half per sack for all wheat put in my barn," fixed the character of the transaction. The whole quantity of wheat taken under that direction fixed the character of the

crime. We think, therefore, that the court did not err in refusing to sustain the objections made, or to require the state to elect. *State v. Dix*, 33 Wash. 405, 74 Pac. 570.

Appellant also argues that the court erred in refusing to direct an acquittal, for the reason that the witnesses Barton, Grant and Miller, who confessedly stole the wheat, were all accomplices; and that a conviction should not be allowed under such evidence. Our statute does not so provide. Upon this question the trial court instructed the jury that these witnesses were all accomplices in the crime charged, and gave the instruction substantially as was upheld by this court in *State v. Jones*, 53 Wash. 142, 101 Pac. 708. This was all that was required.

Appellant also argues that there was no proof that the stolen wheat was the property of the Northern Pacific Railway Company. There is no merit in this assignment, because it was shown that the wheat was taken from the possession of the railway company, and that the company lost that amount of wheat. Rem. & Bal. Code, § 2303, subd. 16. Also, because it was shown that the wheat was stolen wheat, and appellant knew that fact.

We find no reversible error in the record, and the judgment is therefore affirmed.

Dunbar, C. J., and Parker, J., concur.

Gose, J. (dissenting)—The information does not charge a continuing offense as in *State v. Dix*, 33 Wash. 405, 74 Pac. 570. I therefore think that each theft constituted petit larceny. Grand larceny cannot be made to consist of two or more petit larcenies. The motion to require an election should have been sustained. I therefore dissent.

Fullerton, J., concurs with Gose, J.

[No. 9046. Department Two. March 27, 1911.]

D. S. SPRINKLE *et al.*, *Appellants*, v. PEARL C. WEST *et al.*, *Respondents*.[1]

PUBLIC LANDS—HOMESTEAD—EXEMPTION FROM PRIOR DEBTS. Lands acquired under the homestead laws are not subject to a judgment upon a note given between the making of final proof and the issuance of patent, under U. S. Rev. St., § 2296, providing that they shall not be liable in any event to the satisfaction of any debt contracted prior to the issuing of patent.

Appeal from a judgment of the superior court for Klickitat county, McMaster, J., entered June 14, 1910, upon findings in favor of the defendants, after a trial on an agreed statement of facts, in an action to quiet title. Affirmed.

H. Dustin, for appellants.

Ward H. Wheeler, *E. C. Ward*, and *N. L. Ward*, for respondents.

MORRIS, J.—This appeal submits a legal question of simple statement, growing out of the judgment of the court below upon an agreed statement of facts, to which it will not be necessary to refer, as it would be of no additional value. The question is, can land acquired under the homestead laws of the United States be held liable to the satisfaction of a judgment obtained upon a note given between the making of final proof and the issuance of patent. We answer, no. While there is some conflict upon this question, the greater and the better authority is in accord with this view. Section 2296, U. S. Rev. Stats., provides that:

"No lands acquired under the provisions of this chapter shall in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor."

The theory upon which it has been held in *Struby-Estabrook Mercantile Co. v. Davis*, 18 Colo. 93, 31 Pac. 495, 36

[1]Reported in 114 Pac. 430.

Am. St. 266, and other like cases, that the land may be subjected to debts contracted after final proof and issuance of the receiver's certificate but before patent, is that the final certificate is as binding on the government as the patent, and when the patent issues it relates back to the date of the final certificate. So far as the effect upon the title alone is concerned, this is probably true, and under such theory, mortgages executed in this interim have been sustained, it being held that the language of § 2296 does not limit a voluntary lien. This section is not one affecting title, but establishing an exemption against involuntary liens, and inasmuch as the government grants the title, it has the right to exempt it from enforced liability until, by the issuance of its patent, it has parted with all its title and interest in the land. That it was the intention so to do is manifest by the language of the section, so plain as to require no interpretation; and the fact that the government has, by the issuance of its certificate, informed the homesteader that his proofs have been accepted and his right to title established, does not interfere in any way with this further beneficial provision of the law, that until the government has issued its patent, the final evidence of the title, it shall preserve these lands free and clear from any compulsory or involuntary lien "in any event."

The identical question here presented has been passed upon in California and Oregon, and the liability denied under the provision of § 2296. *Miller v. Little*, 47 Cal. 348; *Barnard v. Boller*, 105 Cal. 214, 38 Pac. 728. In the last case it is said:

"The date of issuing the patent is made the point of time which divides the liability and nonliability of the land. It is this event or act which determines the question of liability, and not the title or the question of relation as applicable to the holder thereof which must be taken as the criterion."

In *Wallowa Nat. Bank v. Riley*, 29 Ore. 289, 45 Pac. 766, 54 Am. St. 794, the court reasons that,

"It was within the power of Congress to designate any

point of time which should fix the period of the exemption of homesteads from sale for antecedent debts, and whether such time should be at or upon the happening of some specific event after the vesting of the equitable title in the settler was a matter of public policy for Congress to determine, and, its judgment having been exercised, it is not for the courts to overrule its conclusion by a technical rule of construction."

This case was followed in *Schultz v. Levy*, 33 Ore. 373, 54 Pac. 184. Many cases announcing like and analogous principles are collated in the note to § 2296 in 6 Fed. Stats. Ann. 307. Our own decisions, while not meeting the precise point here involved, have from the beginning announced an interpretation of this section that logically leads to the position now taken. In *Jean v. Dee*, 5 Wash. 580, 32 Pac. 460, judgment was obtained upon a note given prior to the issuance of the patent, and the land sold under execution issued thereon. Ejectment was brought by a grantee of the patentee. The judgment was held void for reasons not necessary to here refer to, but it was also held:

"But even if such judgment were valid, it appears from the facts to which we have above referred that the land in question could never be made subject thereto, for the reason that the claim upon which the same was rendered antedated the issuing of the patent."

and the court, further referring to § 2296, says:

"This language is broad and comprehensive, and admits of but one interpretation. From it it is conclusively made to appear that the grant by the government to the homesteader was subject to the condition that the grant thus made should not be divested, nor in any manner affected, by any proceedings growing out of a claim which antedated the issue of the patent."

In *Weber v. Laidler*, 26 Wash. 144, 66 Pac. 400, 90 Am. St. 726, the question involved was the right of the homesteader to mortgage the land before patent issued, and such right was sustained. The court, in its reference to § 2296, says:

"The decisions are not uniform in their interpretation of

the full meaning of the above statute. They invariably agree that lands cannot be made liable for a debt contracted before the issuance of a patent therefor when it is sought to subject the land to the payment of such debt by an unwilling or involuntary appropriation thereof."

In *Towner v. Rodegeb*, 33 Wash. 153, 74 Pac. 50, 99 Am. St. 936, the question involved was the right of an administrator to sell the improvements and right of possession of a deceased settler upon unsurveyed lands, and in the course of the opinion it is said:

"Moreover, a homestead cannot be made liable for debts contracted before patent issues;"

citing the statute and the California and Oregon cases herein cited.

It is apparent, therefore, that this court has adopted a construction of this statute that eliminates the lien of involuntary appropriation and incumbrance, and calls for a negative answer to the question submitted.

The judgment is affirmed.

CROW and CHADWICK, JJ., concur.

[No. 9287. Department Two. March 27, 1911.]

HOWARD H. LEWIS, *Respondent*, v. JOSEPH WELLARD, *Appellant*.[1]

VENDOR AND PURCHASER—CONTRACTS—FORFEITURE—TENDER OF PERFORMANCE—MUTUAL AND DEPENDENT OBLIGATIONS. Under a contract for the conveyance of land making the last payment and delivery of the deed mutual, concurrent, and dependent obligations, the vendor cannot declare a forfeiture for default in the last payment without making demand and tender of a deed.

Appeal from a judgment of the superior court for Stevens county, Sullivan, J., entered October 5, 1910, upon findings

[1]Reported in 114 Pac. 455.

in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action for specific performance. Affirmed.

Jesseph & Grinstead, for appellant.

J. A. Rochford, for respondent.

Morris, J.—Appeal from a decree of specific performance of a contract for the sale and purchase of land. The contract was made in 1906, and provides for the sale of the land upon deferred payments, the last being due March 1, 1908, when deed was to pass. There was no express provision as to time being of the essence, nor any provision for forfeiture in case of default in payment. It was, however, provided that "this contract can be declared void by the first party (vendor) if second party violates any of the above agreements." Respondent, who is the assignee of the vendee named in the contract, failed to make the last payment due March 1, 1908, and on March 4, appellant served respondent with a notice of forfeiture, but making no demand for the payment due, nor tendering a deed. On May 3, 1910, respondent tendered appellant the amount of the last payment due March 1, 1908, with interest and taxes for the years 1907, 1908, and 1909, and demanded a deed to the land, which was refused. Respondent then brought this action, praying for a specific performance of the contract, and deposited the amount of his tender in the registry of the court. Appellant answered, pleading the default and his forfeiture. The court found for respondent, and the decree is brought here for review.

The contract made the making of the last payment and the delivery of the deed mutual, concurrent, and dependent obligations, and brings the case within the rule uniformly adopted by this court that, where obligations of such a character exist, neither party can put the other in default or claim a forfeiture without first tendering performance on his part. Since its first announcement, there has been no de-

parture from this rule, and it must be accepted as the settled law of the state. *Stein v. Waddell*, 37 Wash. 634, 80 Pac. 184; *Bruggemann v. Converse*, 47 Wash. 581, 92 Pac. 429; *Tacoma Water Supply Co. v. Dumermuth*, 51 Wash. 609, 99 Pac. 741; *Reese v. Westfield*, 56 Wash. 415, 105 Pac. 837; *Kiefer v. Carter Contracting & Hauling Co.*, 59 Wash. 108, 109 Pac. 332; *Gottschalk v. Meisenheimer*, *ante* p. 299, 113 Pac. 765, 115 Pac. 79.

Appellant asserts that a different rule was announced in *Hogan v. Kyle*, 7 Wash. 595, 35 Pac. 399, 38 Am. St. 910, and it was there held that a delay, such as here found, would be fatal to the right to demand a specific performance of the contract. It must be remembered that cases of this character are of equitable cognizance, and the rules governing them must be applied with more or less flexibility as the equities of the particular case warrant, having in mind the special facts and circumstances surrounding each case, and which call for the application of equitable principles. With this understanding, it will be found there is nothing in the *Hogan* case which conflicts with the cases adopting the rule that a tender of performance must be made before a claim of forfeiture, where the obligations are concurrent and dependent. In the *Hogan* case the vendor sought to recover the amount of the unpaid installments due on the contract, bringing his action over two years after the vendee had defaulted in his payments. It was held, (1) that he could not recover the full purchase price and retain the land; (2) that he could not recover because, the obligations being dependent, it was his duty to make and keep good a tender of a deed; and (3) that as he had taken no affirmative action by tendering the deed, he had elected to accept and abide by the forfeiture; and an unexplained delay of two years and three months, time being made expressly of the essence, was laches. These rulings in no way conflict with the rule of dependent obligations. In fact, the case expressly announces such a rule in the second

ground of its decision, and makes the failure to observe it the basis of the laches announced in the third ruling.

The reasoning of the *Hogan* case, and of the authorities there cited, is that, the time having arrived when by the terms of the contract mutual and dependent obligations arise, it is the duty of each party to the contract to fully perform his obligation before he can put the other party in default or enforce any contract obligation against him. The vendee must tender his payment before he can declare a default against the vendor, and the vendor must tender his deed before he can declare a forfeiture against the vendee. These are the very principles upon which the rule of dependent obligations exist, and there could be no better announcement of them than in the *Hogan* case. It is not strange when the court found a vendor retaining his land, retaining the payments made, and then without performing his part of the contract, waiting over two years to enforce a liability against the vendee for the remaining payments, that such conduct hardly appealed to the conscience of the court as equitable, and that some means would be found to defeat it. A principle of law to be authoritative must be taken with its attendant facts. When it is torn from them and sought to be applied elsewhere, it loses its force and ofttimes its life. There is in *Kiefer v. Carter Contracting & Hauling Co.*, *supra*, a holding to the effect, that one who violates his contract cannot make it the basis of a recovery and pray the court to specifically perform a contract which he had not himself regarded as binding. But the court is there speaking of independent and sole covenants, and not of dependent and mutual covenants, and expressly states that such would not be the rule in the latter case.

Appellant also relies upon *Sleeper v. Bragdon*, 45 Wash. 562, 88 Pac. 1036; *Voight v. Fidelity Inv. Co.*, 49 Wash. 612, 96 Pac. 162, and *Garvey v. Barkley*, 56 Wash. 24, 104 Pac. 1108, as supporting a denial of this decree. Those cases are reviewed and their inapplicability to the present

facts shown in *Reese v. Westfield, supra*, where, in an attempt to settle the rule in this state, it is said:

"If the case of *Stein v. Waddell* and the succeeding cases to which we have referred have been hitherto misunderstood, we desire now, for the sake of certainty, to lay down the rule that, where land is sold under a time contract calling for payment by installments, and every installment has been paid except the last one, the vendor may, if he act with reasonable promptness, declare a forfeiture, unless by the terms of the contract he has agreed to perform some act necessary to the complete performance of his agreement, as, for instance, the giving of an abstract or the tender of a deed, in which event his power to forfeit depends upon his offer and ability to perform; for, as this court has said, his duty to tender performance depends upon, and is concurrent with, the duty of the vendee to meet the final payment."

This language ought to be controlling and decisive of the question and forever put it at rest. The vendor here gave his notice of forfeiture, but he neglected to make it effectual by tendering his deed. The vendee made his tender of payment before demanding his deed, and before the forfeiture had become effectual. His failure to sooner make it cannot defeat him where the vendor has failed in the performance of his obligation, and not wholly asserted the right given him under the contract to establish the default of the vendee.

The judgment is therefore affirmed.

Dunbar, C. J., Chadwick, and Crow, JJ., concur.

[No. 9082. Department Two. March 27, 1911.]

JAMES H. DELANO, *Respondent*, v. ED. LA BOUNTY, *Appellant*.[1]

MUNICIPAL CORPORATIONS—STREETS—INJURIES FROM AUTOMOBILE—OWNERSHIP—EVIDENCE—SUFFICIENCY. In an action for personal injuries by a pedestrian struck by an automobile, the evidence is sufficient to establish defendant's ownership of the automobile, although denied by himself and wife, where an unrecorded bill of sale thereof to his wife had unexplained erasures showing that it had been made to the defendant, the state license had been taken out in his name, and also a city taxicab license, under which the machine was being operated by a chauffeur.

SAME—LICENSE—INSTRUCTIONS. Under Rem. & Bal. Code, § 5563, requiring the owner of every automobile to file in the office of the secretary of state his name and address and a description of the vehicle owned by him and obtain a certificate, the certificate is *prima facie* proof of ownership; and an instruction that it was a mere circumstance to be considered in determining the credibility of witnesses is properly refused.

Appeal from a judgment of the superior court for Pierce county Shackleford, J., entered February 26, 1910, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a pedestrian run down by an automobile. Affirmed.

Chas. Bedford, for appellant.

Ray & Dennis, for respondent.

CROW, J.—Action by James H. Delano against Ed. La Bounty, to recover damages for personal injuries. The complaint alleged that the defendant's chauffeur, while running defendant's automobile, at a reckless and dangerous rate of speed, struck and injured plaintiff. From a judgment in plaintiff's favor, the defendant has appealed.

The evidence was sufficient to show negligence of the chauffeur. Appellant contends that the automobile did not

[1]Reported in 114 Pac. 434.

belong to him, but that it was the separate property of his wife, Josephine La Bounty, who had leased it to one Finnigan, the chauffeur; that Finnigan ran it for hire as a taxicab; that it was under his exclusive control; that Mrs. La Bounty had agreed to furnish the use of a garage, provide gasoline, keep up repairs, and as rental was to receive seventy per cent of all fares collected. The issues tried were, (1) whether the automobile was appellant's property or that of his wife; (2) whether Finnigan was appellant's agent; and (3) whether, at the time of the accident, Finnigan was operating the automobile in the due course of his employment, for and on behalf of appellant. On all of these issues the jury found for respondent.

Appellant first insists that the trial judge erred in denying his motions for a nonsuit and for a directed verdict, contending the evidence was not sufficient to show that the automobile belonged to him, or that Finnigan was his duly authorized agent. Although appellant and his wife testified that the automobile was her separate property, their credibility was for the exclusive consideration of the jury. To show that the machine did belong to appellant, respondent relies upon a bill of sale introduced by appellant, a license obtained from the secretary of state by appellant, and a taxicab license issued to appellant by the city of Tacoma. The bill of sale for the auto, typewritten upon a blank form, dated August 11, 1909, running from one Fred Fischbeck to Josephine La Bounty, has not been recorded. Erasures appear upon its face. An inspection discloses that at one time, it contained the name of Ed. La Bounty as a vendee; that his name was subsequently erased, and that other changes have been made. The vendor, the notary who took the acknowledgment, a third party who witnessed the execution of the bill of sale, and the appellant, La Bounty, were none of them called to explain these apparent changes. Mrs. La Bounty testified that the bill of sale was in the same condition at the time of the trial that it had been at all times since she received it.

The license issued to appellant by the secretary of state is dated October 6, 1910. Appellant testified that he told a clerk in the office of the secretary of state the machine belonged to his wife, but the license was nevertheless issued to, and accepted by, him. Its number was attached to the machine. The clerk mentioned was not called as a witness. It was admitted that shortly prior to the accident a taxicab license was issued by the municipal authorities of Tacoma in appellant's name, and that Finnigan operated the machine as a taxicab under such license. These facts and records were sufficient to sustain the findings of the jury, although appellant's alleged ownership of the machine was denied by the evidence of himself and wife.

The appellant further contends that prejudicial error was committed by the trial court in refusing the following instruction:

"You are instructed that the fact that the state and city license for the automobile in question in this case was issued in the name of the defendant under the conditions and circumstances as issued is not proof of the ownership of said machine, but is only a circumstance to be considered by you in weighing the evidence and credibility of the witnesses as to the ownership thereof, and if you believe from the evidence that said automobile was owned by Mrs. La Bounty as her own separate property, then you must find for the defendant."

Section 5563, Rem. & Bal. Code, provides that:

"The owner of every automobile or motor vehicle shall file in the office of the secretary of state annually before June 1st a statement of his name and address, together with a brief description of every such vehicle owned by him and shall obtain from said secretary a numbered certificate for each of said vehicles, which certificate shall state the name of the owner of such vehicle and that he has registered in accordance with the provisions of this chapter. These certificates shall be numbered consecutively, beginning with one."

Under this statute the certificate is *prima facie* proof of ownership, and is in itself sufficient to sustain a verdict un-

less contradicted by competent evidence. The latter portion of the requested instruction is therefore erroneous, in that it denies this character to the document, and limits its force to a mere circumstance to be considered as affecting the credibility of the witnesses. The instruction was properly refused.

Other assignments of error are without merit. The question of respondent's alleged contributory negligence was for the jury. We are unable to conclude that the verdict was excessive. No prejudicial error appears in the record. The judgment is affirmed.

DUNBAR, C. J., CHADWICK, and MORRIS, JJ., concur.

[No. 8035. Department Two. March 27, 1911.]

J. W. O'BRIEN, *Respondent* v. WESTERN UNION TELEGRAPH COMPANY, *Appellant*.[1]

TELEGRAPHS—LEASE OF WIRE—CONDITIONS. A telegraph company may make it a condition of the lease of a wire that operators employed by the lessee shall be satisfactory to the company.

MASTER AND SERVANT—EMPLOYMENT—CAUSING DISCHARGE—LIABILITY—TELEGRAPHS. A telegraph company leasing one of its lines on the condition that the lessee should employ operators satisfactory to it is not liable to an operator for causing his discharge, regardless of improper motives; since the company had the right to say who should use its property.

SAME—BLACKLISTING. Rem. & Bal. Code, § 6565, against blacklisting is not violated by objection to the employment of a person, where such person is required to use the objector's property.

Appeal from a judgment of the superior court for King county, Gay, J., entered February 1, 1909, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Reversed.

Harold Preston, for appellant, contended, *inter alia*, that at common law it is not a tort to induce one man not to

[1]Reported in 114 Pac. 441.

employ another. The hiring was for an indefinite period, and no action can be maintained at common law for wrongfully procuring a discharge. *Frank v. Manhattan etc. Dispensary*, 107 N. Y. Supp. 404; *Martin v. New York Life Ins. Co.*, 148 N. Y. 117, 42 N. E. 416; *Holder v. Cannon Mfg. Co.*, 138 N. C. 308, 50 S. E. 681; *McGuire v. Gerstley*, 204 U. S. 489. The lease containing an express stipulation that plaintiff's employer might employ no person to handle or operate the leased property who was not satisfactory to the defendant, the action will not lie; the discharge was pursuant to a lawful agreement between the parties. Cooley, Torts (1st ed.), p. 81; *Banks v. Eastern R. & Lumber Co.*, 46 Wash. 610, 90 Pac. 1048, 11 L. R. A. (N. S.) 485; *Lewis v. Huie-Hodge Lumber Co.*, 121 La. 658, 46 South. 685; *Raycroft v. Tayntor*, 68 Vt. 219, 35 Atl. 53, 54 Am. St. 882, 33 L. R. A. 225; *Curran v. Galen*, 152 N. Y. 33, 46 N. E. 297, 57 Am. St. 496, 37 L. R. A. 802; *Knickerbocker Ice Co. v. Gardiner Dairy Co.*, 107 Md. 556, 69 Atl. 405, 16 L. R. A. (N. S.) 746; *Chipley v. Atkinson*, 23 Fla. 206, 1 South. 934, 11 Am. St. 367; *Perkins v. Pendleton*, 90 Me. 166, 38 Atl. 96, 60 Am. St. 252; *Walker v. Cronin*, 107 Mass. 555; *Biggers v. Matthews*, 147 N. C. 299, 61 S. E. 55; *London Guarantee & Accident Co. v. Horn*, 206 Ill. 493, 69 N. E. 526, 99 Am. St. 185; *Id.*, 101 Ill. App. 362. The act being in the exercise of a clear legal right, the motive prompting such act is immaterial. *Auburn etc. Plank Road Co. v. Douglass*, 9 N. Y. 444; *Boyson v. Thorn*, 98 Cal. 578, 33 Pac. 492, 21 L. R. A. 233; Cooley, Torts (1st ed.), p. 688; *Lancaster v. Hamburger*, 70 Ohio St. 156, 71 N. E. 289, 65 L. R. A. 856; *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223, 55 N. W. 1119, 40 Am. St. 319, 21 L. R. A. 337; *Parkinson Co. v. Building Trades Council*, 154 Cal. 581, 98 Pac. 1027, 21 L. R. A. (N. S.) 550; *Stevenson v. Newnham*, 13 C. B. 297; *Sparks v. McCreary*, 156 Ala. 382, 47 South. 332, 22 L. R. A. (N. S.) 1224; *Keeble v. Hickeringill*, 11 East 574; *Glendon Iron Co. v. Uhler*, 75 Pa. St.

467, 15 Am. Rep. 599; *Adler v. Fenton*, 24 How. (U. S.) 407.

Beverly L. Hodghead (*George H. Fearons*, of counsel), for appellant, contended, among other things, that the law as construed by the court in this case would deprive defendant absolutely of the right of liberty of contract because it would deprive it of the right of enforcing such contract. McGhee, Due Process of Law, p. 140; *Holden v. Hardy*, 169 U. S. 366; *Patterson v. Bark Eudora*, 190 U. S. 169; *Williams v. Fears*, 179 U. S. 270; *United States v. Joint Traffic Association*, 171 U. S. 505, 572; *American Steel & Wire Co. v. Wire Drawers etc. Unions*, 90 Fed. 613. Any interference with the right to make reasonable contracts is a violation of the 5th and 14th amendments to the Federal constitution. *Mathews v. People*, 202 Ill. 389, 67 N. E. 28, 95 Am. St. 241, 63 L. R. A. 73; *Commonwealth v. Perry*, 155 Mass. 117, 28 N. E. 1126, 31 Am. St. 533, 14 L. R. A. 325; *Shaver v. Pennsylvania Co.*, 71 Fed. 931; *Brennan v. United Hatters of North America*, 73 N. J. L. 729, 65 Alt. 165, 118 Am. St. 727, 9 L. R. A. (N. S.) 254; *Gillespie v. People*, 188 Ill. 176, 58 N. E. 1007, 80 Am. St. 176, 52 L. R. A. 283; *Ritchie v. People*, 155 Ill. 98, 40 N. E. 454, 46 Am. St. 315, 29 L. R. A. 79; *Adair v. United States*, 208 U. S. 161. It is within the contract and sufficient that plaintiff was "not satisfactory" to defendants, and immaterial that he was a good workman. *Gwynne v. Hitchner*, 66 N. J. L. 97, 48 Atl. 571.

Geo. McKay, for respondent, contended, among other things, that the plaintiff had the constitutional right to engage in the pursuit of any lawful occupation and remain undisturbed in the performance of it. *Keeble v. Hickeringill*, 11 East 574; *Curran v. Galen*, 152 N. Y. 33, 46 N. E. 297, 57 Am. St. 496, 37 L. R. A. 802; *Berry v. Donovan*, 188 Mass. 353, 74 N. E. 603, 108 Am. St. 499, 5 L. R. A. (N. S.) 899. The condition in the contract as construed by the

defendant (viz., as conferring an absolute right to require the dismissal of any employee) is in derogation of the demise and is therefore void. *Dorrell v. Collins*, Cro. Eliz. (K. B.) 6, 78 Eng. Rep. 273; *Horneby v. Clifton*, 3 Dyer (K. B.) 264, 73 Eng. Rep. 586; *Pynchon v. Stearns*, 11 Met. (Mass.) 312, 45 Am. Dec. 210; *Chippewa Lumber Co. v. Tremper*, 75 Mich. 36, 42 N. W. 532, 13 Am. St. 420, 4 L. R. A. 373. It is not necessary where one maliciously procures the discharge of a servant, that "the impulse of malice" should be actual, wicked vindictiveness; it is enough that the purpose is illegal. 18 Harvard Law Review, p. 411; *Klingerl's Pharmacy v. Sharp*, 104 Md. 218, 64 Atl. 1029, 118 Am. St. 399, 7 L. R. A. (N. S.) 976.

Thomas B. MacMahon, for respondent, contended, *inter alia*, that if one maliciously interferes in a contract between two parties, and induces one of them to break that contract, to the injury of the other, the party injured can maintain an action against the wrongdoer. 16 Am. & Eng. Ency. Law (2d ed), p. 1110; *Angle v. Chicago etc. R. Co.*, 151 U. S. 1; *Chipley v. Atkinson*, 23 Fla. 218; *Jones v. Stanly*, 76 N. C. 355; *Jackson v. Stanfield*, 137 Ind. 592, 36 N. E. 345, 37 N. E. 14, 23 L. R. A. 588; *Walker v. Cronin*, 107 Mass. 555.

Per Curiam.—In December, 1907, the appellant, Western Union Telegraph Company, leased for a period of years one of its wires running from San Francisco to Bellingham, together with its necessary equipment, to the United Press, an association having for its business the collection and dissemination of news. The contract of lease contained a number of conditions, among which were the following: the exclusive use of the wire was granted only for certain hours of the day, the remainder of the time it was to be subject to use by the telegraph company for its general business; the telegraph company was to keep the wire and its equipment in repair, and if for any cause the same became out of repair so as to be

incapable of transmitting messages, to furnish another equipped wire during the time of such incapacity; the news company was to furnish at its own expense the necessary operators to take care of the news company's business and the necessary office room, giving the telegraph company's office force access thereto for the purpose of inspection; it was expressly provided that the operators so employed should be satisfactory to the telegraph company and subject to its established rules and regulations; and that for a violation of any part of the agreement, the telegraph company had the power to terminate the same upon ten days' notice.

Among the patrons of the United Press was the Bellingham Herald, a newspaper published at Bellingham, Washington. In the publishing rooms of this paper the news company established an office, and the telegraph company connected the leased wire therewith by extending a loop thereto from its main office at Bellingham, and the respondent O'Brien was employed by the United Press as an operator for the office in the Herald's rooms. He worked but a short time, however, until his employment was made known to the telegraph company's officers, who immediately requested his discharge on the ground that he was not satisfactory to the company. The request was granted after some correspondence, and the respondent was afterwards refused employment in other newspaper offices receiving news over the wires of the telegraph company.

The respondent was employed in the Herald office after the contract between the news company and the telegraph company had been entered into and after its terms had been made known to him. His contract of employment called for no fixed term, and he was subject to be discharged at any time at the will of the news company. His work at the Herald office, however, was satisfactory to the news company—in fact it is conceded that he is a skilled operator with ample experience—and he was discharged solely because the telegraph company required it. After his discharge and after he had

been refused employment in other offices controlled by the appellant, he brought the present action against it to recover in damages, alleging that the appellant's acts in procuring his discharge from the employment secured, and refusing to permit him to be employed elsewhere in offices which it controlled were malicious, wrongful and illegal, and were done with the intent to injure him. Issue was taken upon the allegations of the complaint, and a trial had before the court sitting with a jury.

During the progress of the trial the court charged the jury to the effect that if they found that the telegraph company acted wilfully and maliciously in procuring the discharge of the respondent, and in preventing him from procuring employment in the other offices over which it had control, then they might find in his favor in such damages as in their judgment he had suffered thereby, not exceeding the amount claimed in the complaint. The jury entered a verdict in his favor for the sum of $1,200. A judgment was entered thereon, from which this appeal is prosecuted.

We are of the opinion that the judgment is erroneous. The property which the respondent was employed to operate was the property of the appellant, and, under all authority, it was competent for the appellant on leasing it to make it a condition of the contract that no one should be employed to operate it who was not satisfactory to the appellant. And having power to make this a condition of the lease, it has the right to enforce it, without laying itself liable in damages to any one. It matters not what its motives may be in any given case. These are not to be inquired into. Since the right is absolute it may exercise it at its pleasure, without the duty of giving reasons or otherwise explaining its conduct.

But it is suggested that the appellant's acts in the particular case were in violation of the statute against blacklisting. Rem. & Bal. Code, § 6565. An examination of that statute, however, will show that it has no reference to the right of a person to object to the employment of another where the

other is required to use the objector's property. It was intended to prevent the wilful and malicious attempts by one person to prevent another from obtaining any employment of any kind. Here the appellant did not object to the respondent working for persons or companies where he was not compelled to use the appellant's property. On the contrary, there was not only no evidence that it had ever interfered in such a case, but the record shows affirmatively that it had no desire to do so; it objected merely to the respondent's being employed where he would have access to the wires which the appellant owned. In so doing it acted within its rights and incurred no liability thereby.

The judgment appealed from is reversed, and remanded with instructions to dismiss the action.

MORRIS, J., took no part.

[No. 9312. Department One. March 27, 1911.]

HALLIDIE MACHINERY COMPANY, *Plaintiff and Appellant*, v. WHIDBEY ISLAND SAND & GRAVEL COMPANY, *Defendant and Appellant*.[1]

SALES—PRICE—INSTALLMENTS DUE—DEFENSES—DEFECTS. Installments due on the purchase price of hoisting machinery to be installed and guaranteed by the seller cannot be withheld on account of minor defects, where the contract plainly indicates that the parties had in mind possible defects to be cured after the plant was completed.

REPLEVIN—VALUE OF PROPERTY—MEASURE OF DAMAGES. In an action to recover machinery or its value, sold under a conditional bill of sale, where there was evidence that it was worth its price, if it had been up to specifications, but that defendant had been damaged by defects and delay in installing it, the proper measure of its value to the plaintiff is the balance due on the contract price, less proper credits to the buyer.

[1]Reported in 114 Pac. 457.

Cross-appeals from a judgment of the superior court for Whatcom county, Kellogg and Hardin, JJ., entered June 28, 1910, upon findings favorable to the plaintiff, after a trial on the merits before the court without a jury, in an action on contract. Affirmed.

Hughes, McMicken, Dovell & Ramsey, for plaintiff.

Craven & Greene, for defendant.

PARKER, J.—This action was commenced in the superior court by the plaintiff to recover possession from the defendant of a certain gravel hoisting plant, which was delivered by the plaintiff to the defendant under a conditional sale contract entered into between them on September 28, 1908. This contract was partly printed and partly typewritten, and was in the form of a proposal made by the plaintiff to the defendant and accepted by the latter. The proposal was made upon what appears to be a general printed form, which will account for the peculiarity of its language when comparing the printed portions with the typewritten portions. Its terms, so far as necessary for us to notice them, are as follows:

"The company guarantees the apparatus specified herein to be of full working capacity as rated, and agrees to correct any defects in same which develop under normal and proper use within thirty (30) days from the starting thereof, provided the purchaser gives the company immediate written notice of such defects. . . .

"The company to furnish: 1 No. 14 Flory 8¼ x 10—30 HP hoist with boiler and swinging gear attachment, 1 set of derrick irons, complete with swinging wheel, 1 ¾ yard type 'E' Hayward clamshell bucket, 200 ft. of plow steel cable for bucket, 200 ft. of plow steel cable for return of bucket, 50 ft. more or less, main guy of derrick boom, necessary wire rope clips. 120 feet T rail. Necessary castors for derrick carriage, necessary bolts to fasten machinery in place.

"The company agrees to furnish labor for the installation of the above machinery in place on top of the present bunkers at Bellingham, Washington, and deliver to purchasers the machinery in working order.

"Purchaser is to deliver, free of expense to the company, the lumber necessary to build the derrick carriage boom, mast stiff legs for the derrick, also any additional lumber necessary for housing, and furnish power necessary to place all of above machinery and lumber on top of the bunkers, when required by the company, free of cost to the company.

"The company guarantees the capacity of the machinery equal to thirty (30) yards of gravel per hour when not delayed by any conditions whatsoever that might arise from unfavorable positions of material to be moved beyond the limit of the machinery.

"Price: Three thousand and sixty dollars ($3,060) $600 cash at time of signing contract; $1,400 cash at completion of the erection of the machinery as specified. Balance in three notes payable in two, four and six months respectively from date of completion of erection of machinery as specified, with seven per cent (7%) interest.

"If all apparatus should not be forwarded on same date, *pro rata* payments shall be made for partial shipments.

"If completion of erection of all apparatus shall not be made on same date, *pro rata* payments shall also be made during the progress of erection.

"If completion of work or any material part thereof is delayed more than thirty (30) days from any causes for which the company is not responsible, full payment is to be made within three (3) months from date of first shipping receipt, for all apparatus furnished and work completed.

"The title of apparatus herein sold shall not pass from the company until all payments hereinunder (including deferred payments, if any), shall have been fully made in cash, it being agreed that in case a default be made in the payments to be made hereunder, or in any part thereof, according to the terms herein set out, then it shall be optional for the company, or its successors or assigns, to consider the whole amount thereof due under this agreement, no matter how evidenced, as immediately due and payable, although the time of maturity has not yet arrived, and immediately to enter into and upon the premises wheresoever said property may be, and take possession thereof, and thereafter hold the same free and absolutely as if this contract had not been made, and said purchaser expressly waives notice of the right to the exercise of the option above given and said purchaser also waives prior

notice or demand and waives any action for damages or trespass which might arise by the company taking possession of said property in the manner hereinabove provided for.

"It is further expressly agreed that should it be necessary for said company to retake said property at any time before the final payments herein provided for shall have been made, or on account of any breach of the covenants herein contained, that any money or moneys which might have been theretofore paid by said purchaser to said company in part payment for said apparatus shall be presumed to be the amount of damage sustained by a breach of this agreement, which, from the nature of the same, it would be impracticable or extremely difficult to fix the actual damage, and that any sum so received shall be construed to be held by and belong to said company, as and for the actual damages sustained by said company.

"Time is of the essence of this contract.

"The apparatus above specified shall be shipped as follows, or as near as may be: Delivery in about two weeks from receipt of order.

"The above shipping dates are made in good faith, based upon promises of manufacturers. The company agrees to use every reasonable effort to see that apparatus is shipped on time, but is not responsible for delays in shipment or arrival of apparatus above specified not directly manufactured by the company.

"The appartus herein mentioned shall be delivered f. o. b. cars bunkers site at Bellingham, Wash."

The issues may be briefly stated as follows: The plaintiff alleges, in substance, that it has furnished the apparatus according to the contract; that the defendant has defaulted in making payment therefor as provided in the contract, excepting the first payment of $600; that the plantiff has made demand for payment according to the terms of the contract, which demand was refused, that the plaintiff has elected to retake the property because of such default in payment, and has demanded possession thereof, which was refused, and that the property is of the value of $2,500. The usual judgment is prayed for accordingly, in the alternative.

The defendant denies that the apparatus has been furnished by the plaintiff according to the contract, and pleads

three separate counterclaims aggregating approximately $6,000, for which he demands an affirmative judgment against the plaintiff. The first counterclaim is based upon expenses incurred by the defendant in its business, which are alleged to be the result of delay on the part of the plaintiff in furnishing and completing the apparatus. The second counterclaim is based upon the payment of certain bills paid by the defendant in connection with the erection of the apparatus, at the request of the plaintiff. The third counterclaim is based upon damages claimed to have resulted to the defendant from the plaintiff's furnishing a certain defective pump, under a contract with the plaintiff. This counterclaim is based upon a separate contract from that sued upon by the plaintiff. By agreement of counsel, the cause proceeded to trial before Judges Hardin and Kellogg sitting together without a jury. The trial resulted in findings and a judgment in the plaintiff's favor for the possession of the property, and in the alternative, if delivery of the property cannot be had, for the value thereof, which value the court finds to be $1,639.45. The court also awarded the defendant, upon the first counterclaim, $354.60, and upon the second counterclaim $141.25, and directed judgment to be entered therefor in favor of the defendant and against the plaintiff in the event the delivery of the property be had. Otherwise such allowances are to be regarded as credits upon the purchase price, which, with other credits, reduce the value of the apparatus, to the plaintiff, to $1,639.45. From this disposition of the cause, both parties have appealed.

The facts, as found by the trial court, are, in substance, as follows: About two weeks after September 28, 1908, the date of making the contract, the plaintiff delivered at the bunker site of the defendant at Bellingham all of the apparatus specified in the contract, except the clam shell bucket. This bucket was not manufactured by the plaintiff, but was manufactured by Hayward & Company of New York City, and did not arrive at the place of business of the plaintiff in Seattle until

December 3, 1908, when it was immediately shipped to the defendant and installed in its plant on December 5, 1908. The plaintiff used every reasonable effort to have the bucket promptly delivered. The plaintiff commenced to install the machinery on or about October 9th, 1908, and on December 5, 1908, all of the machinery specified in the contract was installed. On December 29, 1908, the defendant notified the plaintiff that the swinging gear attachment would not work satisfactorily. On January 18, 1909, the plaintiff substituted other machinery for the swinging gear. On February 4, 1908, all of the machinery was installed, and the plant had a capacity of thirty yards per hour. All of the machinery and appliances were then installed in a thorough and workmanlike manner, except certain portions thereof enumerated in detail in the court's findings. These defective portions could then be cured so as to result in the whole plant being constructed in a thorough and workmanlike manner at a total cost of $324.70. On that day the plaintiff demanded payment of the purchase price from the defendant, which payment was refused. Whether or not this demand was for the entire unpaid portion of the purchase price or for the second payment of $1,400 is not very clear, but in any event neither was then paid. On the 11th day of February, 1909, the plaintiff elected to consider the whole of the balance of the purchase price due and demanded payment thereof, which was refused, and thereupon plaintiff demanded possession of the apparatus, which demand was also refused.

Between October 16, 1908, and January 18, 1909, the defendant engaged the services of a pile driver and of laborers for the purpose of unloading its scows and raising sand and gravel into its bunkers, which service was rendered necessary by the failure of the swinging gear attachment to work properly. The defendant necessarily expended for these services $354.60. This sum was allowed by the court upon the first counterclaim. There was paid by the defendant, at the

request of the plaintiff, $141.25 upon certain bills incurred in connection with the construction of the plant, which the court allowed upon the second counterclaim. The evidence was not sufficient to support the third counterclaim. The court evidently regarded the value of the apparatus as equal to the contract price of $3,060, provided it had been furnished in perfect condition; and for the purpose of determining the amount of the alternative money judgment to be rendered in favor of the plaintiff, fixed the value of the apparatus at $1,639.45, by deducting from the contract price the $600 paid thereon at the time of making the contract, the $324.70 necessary to expend in curing the defects in the plant, the $354.60 allowed upon the first counterclaim, and the $141.25 allowed upon the second counterclaim, treating all of these sums as credits upon the original purchase price.

It is contended by counsel for defendant that the contract was not sufficiently complied with to entitle the plaintiff to any payment upon the contract price after the first payment of $600. It may be conceded that the plant was somewhat defective at the time of making the first demand for payment, but we think the evidence warranted the court in finding that it was then capable of handling thirty yards of gravel per hour, and was sufficiently completed to entitle the plaintiff to payment of the second installment of $1,400. The terms of the contract plainly indicate that, at the time it was entered into, the parties had in mind possible defects to be cured after the plant was constructed. They evidently did not intend that the $1,400 installment should remain unpaid until the plant was free from all defects and in perfect working order. We are of the opinion that, under the terms of the contract, the plant was in such condition at the time of the first demand for payment that the plaintiff was then entitled to payment of the $1,400 installment upon the purchase price. The defendant failing to make such payment upon the first demand, the plaintiff was entitled to the possession of the property.

It is contended by counsel for the defendant that the court erred in not allowing any portion of the third counterclaim. Some question is made as to whether or not such a counterclaim would in any event be allowable in this case. Passing that question, we think that the court was fully warranted in refusing to allow this claim, upon the ground that there was not sufficient evidence to prove that the plaintiff sold to the defendant the pump claimed to be defective, and upon which alleged sale the counterclaim was based. The plaintiff was therefore not liable for such defect.

There is no contention made here as to the second counterclaim of $141.25, it being conceded that the defendant is entitled to credit upon the purchase price of the plant in that sum.

A correct decision upon the first counterclaim, we think, depends almost wholly upon questions of fact. It is not an easy matter to measure the amount of the expenditures made by the defendant which were the result of the plaintiff's fault. We think these expenditures were, to some extent, the result of the plaintiff's unnecessary delay, and that, under all the circumstances, the amount allowed by the trial court was fair. It is possible, as argued by counsel for the plaintiff, that the court may not have determined the amount of this sum upon a correct theory, but we think the result is substantially correct. This question is involved in both appeals.

Counsel for the defendant contend that there was no evidence of the value of the machinery, and that the court did not correctly fix the value. There was evidence tending to show that the apparatus was of the same value as the contract price if it had been furnished strictly according to contract. The court evidently adopted that measure, as we think the evidence warranted. That being the actual value of the property, it was proper for the court to measure its value to the plaintiff, by reason of the nature of plaintiff's title thereto, by the amount of the balance due to the plaintiff upon the

contract price after allowing all proper credits. 34 Cyc. 1568.

The evidence is very voluminous, and the controversy much involved. A review of the nearly seven hundred pages of testimony convinces us that the disposition of the cause by the learned trial court was free from prejudicial error. The judgment is affirmed. Neither party will recover costs in this court.

DUNBAR, C. J., MOUNT, GOSE, and FULLERTON, JJ., concur.

[No. 9316. Department One. March 27, 1911.]

THE STATE OF WASHINGTON, *on the Relation of James Clark, Plaintiff*, v. THE SUPERIOR COURT FOR CLALLAM COUNTY *et al., Respondents.*[1]

EMINENT DOMAIN—PUBLIC SERVICE—TOLL LOGGING ROAD. The power of eminent domain is not conferred for private purposes, by Rem. & Bal. Code, §§ 7106-7109, granting the right to toll logging roads, chutes, flumes, and artificial water courses for the carriage of timber products, under the requirement that the road transport all timber products offered for carriage as its means of transportation is adapted to carry, and providing that such roads shall be deemed *quasi* public companies and common carriers; and the fact that its duty is limited to the carriage of timber products does not affect the public character of the service.

EMINENT DOMAIN—LOCATION OF ROUTE—NECESSITY FOR TAKING. Condemnation for a toll logging road cannot be objected to on the ground that no necessity is shown for condemning the particular route surveyed; since the company can make its own selection.

EMINENT DOMAIN—PROCEEDINGS—CORPORATIONS—PROOF OF INCORPORATION—EVIDENCE—SUFFICIENCY. In condemnation proceedings, the triplicate copy of the articles of incorporation, held in the office of the company, is sufficient evidence of the incorporation; and a certificate and receipts of the secretary of state showing the filing of the articles and payment of filing and license fees are *prima facie* proof of its existence; Rem. & Bal. Code, § 3682, making a certified copy of the articles *prima facie* proof, not being exclusive.

[1]Reported in 114 Pac. 444.

EMINENT DOMAIN—PUBLIC SERVICE—TOLL LOGGING ROAD. The fact that all the stock of a toll logging road is held by a lumber company or its stockholders who own most of the timber accessible to the road sought to be condemned, does not deprive the road of its public character or render the enterprise a private one, where considerable other timber owned by others will be rendered accessible and can be transported over the road.

Certiorari to review a judgment of the superior court for Clallam county, Still, J., entered December 16, 1910, adjudging a public use and necessity in proceedings to condemn a right of way for a logging road. Affirmed.

R. C. Wilson, for relator.

Trumbull & Trumbull, for respondents.

PARKER, J.—The relator has brought here by writ of review, and seeks to have reversed, an adjudication of public use and necessity, rendered by the superior court for Clallam county against him and in favor of the Port Crescent Timber Transportation Company, in an eminent domain proceeding commenced by that company to acquire a right of way over land of the relator for a toll logging road. The company claims the right to so acquire a right of way over the relator's land by virtue of the power of eminent domain granted by chapter 82, p. 161, Laws of 1905, being Rem. & Bal. Code, §§ 7106-7109.

It is contended by counsel for relator that in so far as this law authorizes the taking of private property for the use therein specified it is unconstitutional, in that such defined use is not in fact a public use. The provisions of the law are as follows:

"Section 1. Any two or more persons may incorporate a company, having for its principal object the construction, maintenance and operation of logging roads, chutes, flumes and artificial watercourses, or waterways and other ways, for the transportation of logs and other timber products. Such corporation shall have power to acquire, hold, use and transfer all such real and personal property as shall be reasonably necessary for carrying on the business of such corporation.

"Sec. 2. Such corporation shall have power to build, construct, maintain and operate logging roads, whether skid roads, railroads or any other kind, also chutes, flumes and artificial watercourses, waterways and other ways, for the transportation of logs or any other timber products, together with all necessary yarding grounds, rollways and landings.

"Sec. 3. After any such logging road, way, chute, flume or artificial watercourse or other improvements shall have been constructed, such company shall transport all timber products offered to it for carriage as its means of transportation are adapted to carry, and such company shall have the right to charge reasonable tolls for the use thereof, which tolls shall be uniform, having due regard to the portion or length of any such logging road, way, chute, flume, or artificial watercourse or other improvements used by any person. Such company shall have a lien for the amount of its reasonable tolls and charges upon any and all logs or other timber products transported by it over its logging road, way, chute, flume or artificial watercourse. Notice of such lien shall be filed, and the same shall be enforced, in the same manner as is now or may hereafter be provided for the filing and enforcement of liens on logs by boom companies.

"Sec. 4. Such companies shall be deemed *quasi* public companies and common carriers, and any such company shall have the right of eminent domain and shall have the right to appropriate and condemn lands and property for its use. Such right of condemnation and of eminent domain shall be exercised in the same manner as is now, or may hereafter be, provided by law for the condemnation of property by ordinary railroad corporations exercising the right of eminent domain: *Provided*, That the right of eminent domain shall not be exercised by any such corporation with respect to any residence. *And provided further*, That any property acquired by such corporation under the provisions of this act by the exercise of the right of eminent domain shall be used exclusively for the purposes of this act; and whenever the use of such property as herein contemplated shall cease for the period of one year, the property shall revert to the original owner, his heirs or assigns. Nothing in this act shall be construed to authorize the taking or damaging of any power plant constructed or being constructed for the creation or utilization of water power."

These provisions seem to leave no uncertainty as to the service which may be required by the public of a corporation organized thereunder. The language defining the public service obligation is, such company "*shall transport all timber products offered to it for carriage as its means for transportation is adapted to carry.*" And it is further provided that "*such companies shall be deemed quasi public companies and common carriers.*" The argument of counsel for relator, touching the question of public use as defined by this law, is based upon the fact that such corporations are only required to carry "*timber products.*" It is insisted that this required service is so limited that the whole public cannot command the service of the corporation. It seems to us that the whole public can command the service of the corporation in the business in which it is engaged and authorized to carry on. Every person desiring to ship timber products over such road may require the corporation to carry such timber products under exactly the same conditions. This is certainly a public service, and we are not able to see that it is any less a public service because the corporation is a common carrier of a particular class of property. Every public service corporation is engaged in a business which is more or less limited in character. The fact that such business is so limited does not change its character, so far as the right of the public to command the service of the corporation in its particular business is concerned. An express company is generally a common carrier of a particular class of property. A street or interurban railway company may be a common carrier of passengers only. No one would contend that such companies are not public service corporations because of the limited character of their business. This court has recognized boom companies as public service corporations, and such companies, as organized under the laws of this state, are engaged in a business the character of which is confined within just as narrow limits as is the business of corporations organized under this law. Boom companies being public service cor-

porations, their right of eminent domain, under legislative grant, has been recognized by this court. *North River Boom Co. v. Smith*, 15 Wash. 138, 45 Pac. 750; *Healy Lumber Co. v. Morris*, 33 Wash. 490, 74 Pac. 681, 99 Am. St. 964, 63 L. R. A. 820; *State ex rel. Wilson v. Superior Court*, 47 Wash. 397, 92 Pac. 269.

In the case last cited, at page 401, the court said: "The right to condemn is determined by this right of the public to demand the service so as to make necessary the appropriation sought." We are of the opinion that the public service required of corporations organized under this law is sufficient to support the legislative grant therein of their right of eminent domain, and the law is not unconstitutional because of the limited character of the service required.

It is contended that there was no proof of the necessity to take the particular land described in the petition. The proof shows that the line of the proposed road was surveyed and located by agents of the company on the line described in the petition. The contention does not seem to be against the quantity of land sought to be taken as a right of way, but that the necessity of adopting the particular route so located is not proven. This objection is not available to the relator. The rule upon this subject is stated in 2 Lewis on Eminent Domain (3d ed.), § 604, as follows:

"It may be objected that there is no necessity of condemning the particular property, because some other location might be made or other property obtained by agreement. But this objection is unavailing. Except as specially restricted by the legislature, those invested with the power of eminent domain for a public purpose, can make their own location according to their own views of what is best or expedient, and this discretion cannot be controlled by the courts."

It is contended that there was no legal proof of the incorporation of the company or of the contents of its articles of incorporation. There was offered in evidence articles of incorporation purporting upon their face to be one of the trip-

licates executed by the incorporators on August 18, 1910. Oral evidence was admitted to prove that this paper is in fact one of such triplicates; that it is the one retained in possession of the corporation; and that the others were filed respectively in the office of the secretary of state and the county auditor. These articles clearly show that the corporation was organized under this law. There was also offered in evidence the certificate of the secretary of state issued in usual form, to the effect that the articles of incorporation of the "Port Crescent Timber Transportation Company" were, on the 20th day of August, 1910, filed in the office of the secretary of state. There was also offered in evidence a receipt from the secretary of state showing payment of his fees for filing and recording articles of incorporation of this same company, and also showing payment of its license fees. All of this evidence was objected to as not being legally sufficient to prove the incorporation or the contents of the articles. The contention of counsel is rested upon Rem. & Bal. Code, § 3682, which provides:

"A copy of any certificate of incorporation filed in pursuance of this chapter, and certified by the auditor of the county in which it is filed, or his deputy, or by the secretary of state, shall be received in all the courts and places as *prima facie* evidence of the facts therein stated."

We think, however, that this does not mean that such certified copies shall be the only competent proof of the existence of a corporation or of the contents of its articles of incorporation. We think that the triplicate of the original articles of incorporation, retained in the possession of the company as the law requires, was sufficient to show their contents without further proof, and that the other evidence offered was sufficient *prima facie* proof of the existence of the corporation.

It is contended that since all of the stock of the Port Crescent Timber Transportation Company is held by a timber company or its stockholders, which company is the owner of

the largest part of the timber accessible to the line of the proposed road, which timber that company will be enabled to transport to market by the building of the road, the enterprise is in fact a private enterprise, and that the taking of this land for right of way for the proposed road is really taking it for the private use of the timber company. Conceding these facts to be established by the evidence, we think the evidence also establishes the fact that considerable other timber will be rendered accessible to this road and that other people and corporations than the timber company will be in position to demand transportation service from the company. It was said by Judge Rudkin, speaking for the court in *State ex rel. McIntosh v. Superior Court*, 56 Wash. 214, 105 Pac. 637, that,

"The fact that private individuals or private corporations having a special interest in the construction of a railroad subscribe to its capital stock does not deprive the road of its public character. The road when constructed will be a public service corporation and must serve the public, regardless of the individuality of its stockholders or the business in which they may be engaged."

We are of the opinion that the adjudication of public use and necessity should be affirmed. It is so ordered.

DUNBAR, C. J., MOUNT, GOSE, and FULLERTON, JJ., concur.

[No. 8842. Department One. March 27, 1911.]

ORVILLE M. JOHNSON, *Respondent*, v. WASHINGTON WATER POWER COMPANY, *Appellant*.[1]

APPEAL—REVIEW—VERDICT. Where the evidence is hopelessly in conflict, the verdict is conclusive upon appeal.

CARRIERS—OF PASSENGERS—ASSAULT BY CONDUCTOR—INSTRUCTIONS. In an action by a passenger for an assault by a street car conductor, an instruction that there can be no recovery if plaintiff had alighted from the car and provoked the assault before he was struck, is not objectionable as leaving an inference of liability for assault after plaintiff had ceased to be a passenger, unless he provoked the assault.

SAME—TERMINATION OF RELATION—INSTRUCTIONS. In an action by a passenger for an assault by a street car conductor, the jury are properly instructed that after a person becomes a passenger the relation exists until he has alighted and had a reasonable time to leave the place at which he alights, and if assaulted before he could leave the immediate presence of the car and proceed on his journey, he was still a passenger.

TRIAL—VERDICT—SPECIAL FINDING—DEFINITENESS. In an action by a passenger for an assault by a street car conductor, where an interrogatory was submitted as to whether plaintiff had alighted when first struck, an answer that he was on the car when first struck is not too indefinite.

APPEAL—PRESERVATION OF GROUNDS—VERDICT—SPECIAL FINDING—OBJECTIONS. Objection that an answer to an interrogatory submitted to the jury was too indefinite must be made when the verdict is returned, and a more definite finding requested, and cannot be first raised on appeal.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered February 25, 1910, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a passenger assaulted by the conductor of a street car. Affirmed.

Post, Avery & Higgins, for appellant.

W. H. Plummer and *Geo. A. Latimer*, for respondent.

[1]Reported in 114 Pac. 453.

FULLERTON, J.—This action was brought by the respondent against the appellant to recover for personal injuries. In the complaint it is alleged, that the defendant operates a street railway system in the city of Spokane and vicinity, one line of which runs from the main part of the city to the town of Hillyard; that the respondent boarded one of the appellant's cars running on this line in the city of Spokane and rode therein to the town of Hillyard, and proceeded to alight therefrom when he was assaulted and beaten by the conductor of the car. The answer put in issue the allegations of the complaint relating to the assault, and alleged affirmatively that the injuries received by the appellant, if any he did receive, was the result of his own acts and negligence and not the fault of the appellant. A denial was filed to the reply. On the issues thus made a trial was had, which resulted in a verdict for the respondent in the sum of $3,300. The trial judge, however, deemed the verdict excessive and gave the respondent the option of taking a judgment for $1,500 or of submitting to a new trial. The respondent accepted the first part of the alternative, and judgment was entered in his favor for $1,500, and this appeal taken therefrom. The appellant in this court makes two principal contentions: (1) that the judgment is not supported by the evidence and is excessive, and (2) that erroneous instructions were given the jury.

On the first proposition suggested, the evidence is hopelessly in conflict. If the respondent's story is to be believed, the conductor was the aggressor throughout the controversy, the assault was as vicious as it was unprovoked, the injuries of the respondent were severe and lasting, and his sufferings therefrom acute. On the other hand, if the version of the appellant is to be taken as true, no recovery at all should be had. Its evidence was to the effect that the respondent provoked the assault, and that it occurred after he had ceased to be a passenger. Its evidence tended to show also that the injuries received by the respondent were trivial, entitling him to merely nominal damages, conceding the liability of the ap-

pellant to answer in damages at all. This being the condition of the record, it is plain that the question of liability was for the jury and the trial judge, and since they have accepted the evidence of the respondent as containing the truth, we cannot do otherwise than accept it also. So with the question of the amount of the damages, we can find no cause for a further reduction than that made by the trial court.

The exceptions to the instructions seem to us to have no substantial merit. The first exception is to the following:

"But if you find in this case, gentlemen, that the plaintiff had alighted from the car at Hillyard before he was struck by the conductor, if you find he was struck by the conductor as alleged in the complaint, and that after he alighted he used the abusive language towards the conductor of the car and the conductor thereupon struck him and the injuries were inflicted as alleged in the amended complaint, then the court instructs you that the defendant would not be liable for the act of the conductor, and you should find in that case a verdict for the defendant in this case."

The second exception is to the statement of the court to the effect that after a person becomes a passenger on the carriage of a common carrier the relation exists until the passenger has alighted and has had a reasonable time to leave the place at which he alights. The third was an instruction to the effect that if assault was made after the appellant had alighted from the car but before he had time to leave the immediate presence of the car and proceed on his journey, and was made without provocation, the jury could find that the assault was made while he was still a passenger.

It is objected to the first of these instructions that it leaves the inference that the appellant is liable for an assault made by its conductors on a person who has ceased to be a passenger by leaving its car, unless the assault was provoked by abusive language on the part of the person assaulted. But to our minds it does not bear this construction. It seems to us to be a plain statement to the effect that the plaintiff could not recover if the assault was made upon him after he had

ceased to be a passenger, and we cannot think the jury otherwise understood it.

The other instructions correctly state the rule with reference to passengers upon railroads. *Glenn v. Lake Erie & W. R. Co.*, 165 Ind. 659, 75 N. E. 282, 112 Am. St. 255, 2 L. R. A. (N. S.) 872. While the authorities do not seem to be quite uniform on the question, we think the rule exists with reference to passengers upon street cars also. A passenger on alighting from a street car is more or less subject to the conditions in which the carrier has placed him, and common prudence dictates that he should have a reasonable time to note the surroundings and prepare to protect himself from the ordinary dangers of the street. This right is denied him if he may be assaulted with impunity by one of the servants of the carrier, on whose vehicle he has taken passage, the moment his feet strike the ground.

The following interrogatory was submitted to the jury: "Had the plaintiff alighted from the car at the time he was first struck by conductor Coughlin? To this the jury answered as follows: "Mr. Johnson was on the car when first struck." It is objected to this that it is indefinite, but we do not think it so. Furthermore, the remedy for an error of this kind is to object when the verdict is returned, and move for a more definite finding. The record fails to show that any such objection was made to the verdict.

The judgment is affirmed.

GOSE, PARKER, and MOUNT, JJ., concur.

[No. 8906. Department One. March 27, 1911.]

MIKE BREKICK, *Appellant*, v. PATRICK WELCH, *Respondent*.[1]

MASTER AND SERVANT—ASSUMPTION OF RISKS—DANGEROUS METHODS. Where a laborer, instead of having himself let down an eighteen foot shaft by the windlass, let the bucket down and unwound the rope to the staple on the windlass and swung himself over the shaft intending to slide down the rope, whereupon the staple pulled out, he assumes the risk, as a matter of law, where he well knew the danger of adopting that method of entering the shaft (GOSE, J., dissenting).

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered December 18, 1909, upon granting a nonsuit, dismissing an action for personal injuries sustained by an employee engaged in railroad construction work. Affirmed.

Skuse & Morrill and *F. H. McDermont*, for appellant.

Robertson & Miller and *Harry Rosenhaupt*, for respondent.

FULLERTON, J.—In 1908 the respondent, as contractor, was engaged in the construction of a railroad bed from the city of Spokane westerly, and had in his employ, among others, the appellant. At the time of the accident which gives rise to this controversy, the appellant was engaged with others in sinking a shaft from the surface of the ground down to the grade of the railroad bed. The surface of the ground above the bed was at this point some eighteen feet, and to bring the earth to the surface a windlass, ropes and bucket were used. The rope was fastened to the windlass by an ordinary staple placed astride the rope and driven into the windlass. The appellant, with same five or six others, did the work of sinking the shaft. After it had reached the level of the grade, and just as the work was about to begin on laterals, the foreman of the work came along and directed the appellant to go down into the shaft and assist the men

[1]Reported in 114 Pac. 435.

there in running the laterals, at the same time telling the others, who had been operating the windlass, of some work at another place which he desired them to perform. The appellant thereupon, instead of having himself let down by the windlass as had theretofore been the practice, let the bucket drop down to the bottom of the shaft and the rope unwind to the staple, seized the rope and swung himself over the shaft, intending to slide down the rope to the bottom. His weight, however, was too great for the fastening, and the staple pulled out, letting him fall to the bottom of the shaft onto the bucket. He received permanent and severe injuries, and this action was brought to recover therefor. On the trial, after he had rested his case, the court on motion took the case from the jury and entered a judgment to the effect that the appellant take nothing by his action. This appeal followed.

The trial judge in granting the motion for judgment took the view that the danger of injury from the mode of entering the shaft, adopted by the appellant, was open and apparent, and that the appellant must be held to have assumed all the risks arising therefrom. This view has seemed to us to be sound. To review the evidence on which the conclusion is based would but lengthen this opinion and serve no useful purpose, but it can be gathered therefrom that the appellant well knew the danger to himself of the method he adopted by which to enter the shaft, and this being true, he must be held alone liable for the consequences.

The judgment appealed from will stand affirmed.

PARKER and MOUNT, JJ., concur.

GOSE, J. (dissenting)—In view of the fact that the appellant obeyed the command of the foreman, I think the question of the assumption of the risk should have been submitted to the jury. I therefore dissent.

[No. 9040. Department One. March 27, 1911.]

WELDON SPARKS, *Respondent*, v. BEMIS BROTHERS BAG COMPANY, *Appellant*.[1]

APPEAL AND ERROR—REVIEW—FINDINGS—PREPONDERANCE OF EVIDENCE. In an action for personal injuries tried to the court, in which there were but two witnesses to the accident, apparently of equal credit, who testified to entirely different facts, and the record on appeal fails to show that plaintiff has sustained his case by a preponderance of the evidence, a judgment for the plaintiff based upon the trial judge's rule "to resolve doubts in favor of the weak and lowly and against the strong and powerful," is not conclusive on appeal, but will be reversed and the action dismissed, notwithstanding plaintiff produced sufficient evidence to sustain the judgment.

Appeal from a judgment of the superior court for King county, Tallman, J., entered April 1, 1910, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action for personal injuries. Reversed.

Farrell, Kane & Stratton, for appellant.

Bo Sweeney, for respondent.

FULLERTON, J.—The respondent brought this action against the appellant to recover for personal injuries received by him while in the appellant's employ. The record discloses that the appellant was engaged in the business of manufacturing bags of various sorts for holding grain, flour, and similar products. That in the manufacture of these articles it used a number of machines called presses, capable of doing the combined work of cutting bags from bolts of cloth, printing thereon any matter desired, and folding the cut bag into shapes convenient for handling. The respondent, at the time of his injury, was employed as an assistant in the operation of these presses. The appellant also had in its employ at this time a machinist by the name of Buckner, whose duty it

[1]Reported in 114 Pac. 442.

was to keep the different machines used in and about the appellant's business in working order. The presses were not all self-feeders, and at the time the respondent was injured, the machinist was endeavoring to install on one of them a self-feeding device. To that end he had dismantled the machine and had fixed thereon a self-feeding device, and for some two weeks prior to the injury he had been using such time as he could spare from his routine work in an endeavor to make the feeder operate successfully. During the course of the work it was necessary to occasionally remove and replace various parts of the press, and the machinist would call on some one or another of the workers in the press room to assist in running or replacing the heavier parts.

To the accident itself there were only two witnesses, the respondent and the machinist. The respondent testified that after the machinist had been working for some time on the machine on the morning of the accident, he called on the respondent to come and assist him in threading it. The respondent acceded to the request, and in doing so was obliged to get onto a platform and work somewhat over the press, which was then not in motion. He completed the work, but before he got down from the platform the machinist started the press in motion without giving him any warning, and in consequence he was caught in the uncovered gearing of the machine and suffered the loss of the greater part of his hand.

The machinist's version of the transaction is diametrically opposed to that of the respondent. He testifies that the press at that time was practically adjusted, that he had it threaded with the cloth, and was operating it to ascertain if its different parts were timed correctly, stopping it when he found it necessary to make some change in the adjustment, and starting it again when he had the change completed. This process had been going on for some hours, when he saw the foreman of the shop and the respondent come up behind the press, that he paid no particular attention to them, as he was busily engaged in his own work. Afterwards he noticed the

foreman go away, leaving the respondent alone at the machine; that shortly thereafter he heard respondent cry out, and on stopping the press and going to him, found that he had been injured; that he asked the respondent how it happened, and the respondent said that he did not know. The witness further testified that it was a one man's job to thread the machine, and that he would have no necessity to call on any one to assist him in that work. The action was tried by the court sitting without a jury, and resulted in a judgment in favor of the respondent for the sum demanded in the complaint.

While a number of errors have been assigned, we have found it necessary to notice but one; namely, the contention that the judgment is not sustained by a preponderance of the evidence. It will be remembered that there were but two witnesses to the particular acts which give rise to the controversy, the respondent himself, and the machinist. The respondent, it is clear, testified to facts which, if taken as true, rendered the appellant liable to answer for the injuries suffered by him, assuming, of course, that the machinist was a vice principal of the appellant and not the respondent's fellow servant. It is equally clear also that there is no liability whatsoever if the facts were as testified by the machinist, no matter what view may be taken as to the relation of the machinist to the parties. Looking at the record as it appears in this court, we are unable to find anything which impugns the honesty of either of these witnesses. They both withstood searching cross-examination, and there seems to be no inherent probability that the story of the one is more likely to contain the truth than the story of the other. In the lights we have, it is manifest that the respondent has not sustained his case by a preponderance of the evidence; a burden that was upon him by reason of his having the affirmative of the issue. But we realize that in this class of cases the advantage all lies in being able to meet the witnesses face to face while they are giving their testimony. We realize also that the

trial judge had this advantage, and if it appeared that he had determined the cause on the preponderance of the evidence we would have been inclined to accept his conclusion and to let the finding stand. But the record makes it clear that the trial judge was influenced in his decision by causes other than a preponderance of the evidence. This is shown by his opinion rendered at the conclusion of the testimony when giving his decision, a part of which we quote:

"I am somewhat in doubt, but I have a rule which I have adopted, and I will follow it in this case, that when I am in doubt I will resolve the doubt in favor of the weak and the lowly and against the strong and the powerful. The plaintiff has, however, produced ample evidence to sustain a judgment in his favor."

It is needless, perhaps, for us to say that the foregoing furnishes no criterion by which to determine the rights of litigants in a court of justice. Courts in the administration of justice must not know among the litigants before it either the weak or lowly, or the strong or powerful, but it must decide causes according to the right of the matter, letting the hurt fall on whom it will. Nor it is enough in such a case as this that the plaintiff has produced evidence sufficient to sustain a judgment in his favor, as the burden was upon him to prove his case by a preponderance of the evidence. Since, therefore, the trial court failed to find that the respondent had proved his cause by a preponderance of the evidence, and since we cannot so find from the record in this court, it follows that the judgment appealed from must be reversed, with instructions to enter a judgment for the defendant. It will be so ordered.

GOSE, PARKER, and MOUNT, JJ., concur.

[No. 8776. Department One. March 28, 1911.]

JULIA ELLEN DOMKE, *Respondent*, v. HENRY GUNNING, *Appellant*.[1]

MUNICIPAL CORPORATIONS—USE OF STREETS—AUTOMOBILES—INSTRUCTIONS—CARE REQUIRED. It is not prejudicial error to instruct that the owner of an automobile must exercise "exceeding" care upon the busy streets of a city, where in other instructions the jury were told that he must exercise reasonable care to avoid injuring any one, and would be liable if he failed to exercise such care as an ordinary prudent person would exercise under like circumstances.

SAME—COMMENT ON FACTS. In instructions as to the care required of the driver of an automobile, a phrase "moving quietly as it does," it not an unlawful comment on the evidence, where it had reference to automobiles generally and not to the one in question.

SAME—CARE REQUIRED. An instruction as to the care required of the driver of an automobile in a busy city street properly requires him to exercise such skill and care as to anticipate such collisions as the nature of the machine and the locality might suggest as liable to occur in the absence of such precautions.

SAME—REGULATIONS—ORDINANCES—"CURB"—BARRICADES. Under a city ordinance requiring drivers of automobiles upon turning corners to leave a space of six feet between the curb and the automobile, a fence or barricade in the street in front of a building that was being erected is properly taken as the "curb," where pedestrians were required to leave the walk and step into the street outside the fence or barricade.

APPEAL AND ERROR—PRESERVATION OF GROUNDS—INSTRUCTIONS—OBJECTIONS—AMENDMENT. It is unavailing to object that an instruction as to negligence of the driver of an automobile in any of the respects provided in the city ordinances "or otherwise" is outside the allegations of the complaint, in view of the rule that the complaint may be deemed amended; there being no objection that it goes beyond the evidence.

MUNICIPAL CORPORATIONS—USE OF STREETS—AUTOMOBILES — CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS. An instruction that plaintiff, struck by an automobile, cannot recover if her negligence contributed in any "appreciable" degree is not objectionable as equivalent to "important" or "material" degree.

[1]Reported in 114 Pac. 436.

APPEAL—REVIEW—INSTRUCTIONS—REQUESTS. It is not error to refuse to instruct in the language requested, when covered in the general charge.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered September 18, 1909, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a pedestrian struck by an automobile. Affirmed.

Gallagher, Smith & Mack, for appellant.

Post, Avery & Higgins, for respondent.

FULLERTON, J.—The appellant, while driving an automobile on the streets of the city of Spokane, ran against the respondent and severely injured her. She thereupon brought the present action to recover for the injuries so suffered, and on the trial was awarded a verdict in the sum of $3,500. From the judgment entered thereon, this appeal is prosecuted.

The assignments of error relate to certain instructions given by the court, and the refusal to give certain others, and failing to rule that the appellant was guilty of contributory negligence as a matter of law.

From the instructions, we quote the following:

"You will observe that the case proceeds upon the charge of negligence, plaintiff alleging that the defendant was negligent in the driving of his automobile and that this negligence was the cause of the collision with her, while the defendant denies negligence on his part and alleges that the proximate cause of the collision was the plaintiff's own carelessness and negligence.

"I instruct you that both the plaintiff and the defendant with his automobile had a right to the use of the streets of the city at the time and place in question, plaintiff having the right to cross the street and the defendant having the right to drive along the street with his automobile. Each party, however, owes a legal duty to the other in using the street. It was the duty of the plaintiff in starting across the street to exercise reasonable care for her own safety and it was the duty of the defendant in driving his automobile to

exercise reasonable care so as to avoid injuring any one or colliding with any other person upon the street.

"The operation of an automobile upon the busy streets of a city necessitates exceeding carefulness on the part of the driver. Moving quietly as it does, without the noise which accompanies the movement of a street car or other ordinary heavy vehicle, it is necessary that caution should be continuously exercised to avoid collisions with pedestrians unaware of its approach. The speed should be limited, warning of approach given, and skill and care in its management so exercised as to anticipate such collisions as the nature of the machine and the locality might suggest as liable to occur in the absence of such precautions.

"It was also the duty of the defendant to observe all the provisions of the ordinance of the city of Spokane with reference to the speed of driving his automobile, the giving of any signal or warning, and the manner in rounding corners. In this respect I instruct you that under the ordinance of this city it would be negligence on the part of any person driving an automobile to drive it at the place in question at a greater rate of speed than four miles an hour; also, it would be negligence for the defendant to round the corner from Sprague avenue into Post street closer to the curb than six feet.

"In this respect I instruct you that if you find from the evidence that there was debris or building material piled upon the sidewalk so that the same was impassable for foot passengers and that said debris and building material extended beyond the sidewalk into the street so that foot passengers were required to use the street in common with horses and vehicles, and if you find that the evidence also shows that this condition existed at the corner and upon both Sprague avenue and Post street and that there was a fence or barricade separating the debris and building material from the street, then the fence or barricade would be regarded as the curb in the provisions of this ordinance.

"If you find from the evidence that the defendant at the time and place in question failed to exercise such care in any or all these respects as an ordinarily prudent person would exercise under like circumstances, or if you find from the evidence that the defendant was negligent in any of the respects provided in the ordinance or otherwise, and that his

negligence in any of such respects was the direct and proximate cause of the collision and the injury to plaintiff, then the defendant would be liable to her for the injury she sustained.

"On the other hand, if you should find from the evidence that the plaintiff herein was negligent and that her own negligence was the direct and proximate cause of the collision and her injury, or that her own negligence contributed to the collision and the injury in any appreciable degree then the plaintiff cannot recover and your verdict will be for the defendant, even though the defendant himself was negligent."

The first exception is taken to that part of the third paragraph above set out wherein the court told the jury that the operator of an automobile upon the busy streets of a city necessitates exceeding carefulness on the part of the driver. It is contended that the word "exceeding" must be here construed to mean that the defendant was required to use the highest degree of care in order to prevent injury to pedestrians on the street, while such is not the rule; that the rule governing such cases is that the driver must use only ordinary care. But that it was not the intention of the court to so instruct is made plain by what it said both preceding and following this instruction. In the preceding paragraph, the court, after telling the jury that each of the parties were lawfully in the street, further told them that it was the duty of the defendant in driving his automobile to exercise reasonable care so as to avoid injuring any one, and in a later instruction, told them that if they found from the evidence that the defendant, at the time and place in question, failed to exercise such care as an ordinary prudent person would exercise under like circumstances, then he was liable to the plaintiff for her injuries. These instructions, which are conceded to correctly state the law of the case, would be inconsistent with the instruction complained of had it been the court's intent therein to rule that the measure of the plaintiff's duty was the highest degree of care. Nor do we think the jury could have misunderstood the court. The inference one gathers

from reading the instructions as a whole is that the court, in the paragraph in which the objectionable language is found, undertook to define what would constitute ordinary care on the part of an automobile driver on the public streets of a populous city. Looking to the instruction in this light, we see nothing objectionable in it. It fairly states the rule of ordinary care governing under the circumstances.

The appellant further objects to the phrase "moving quietly as it does," contending that it is a comment on the facts and the taking into consideration a fact which the court cannot judicially know. But it is obviously not a comment on any fact in the case, since the court was referring to automobiles generally, not the one in question here, and we think that it is within the common knowledge of mankind that an automobile with its pneumatic tires running on the comparatively level paved streets of a city moves quietly.

The last sentence of the paragraph is also criticised, but we can hardly think it overstates the duties of an automobile driver under the circumstances. The degree of care used should be commensurate with the dangers naturally incident to the use of the automobile in the particular place, and while it is true that the driver is not required to anticipate or guard against anything that the appearances would not usually suggest to an ordinary prudent person, we do not think the court overstated the rule when he said that the driver should exercise such skill and care in the management of his machine "as to anticipate such collisions as the nature of the machine and the locality might suggest as liable to occur in the absence of such precautions."

The respondent pleaded and proved an ordinance of the city of Spokane making it the duty of a person driving an automobile on the streets of the city, "upon turning the corner of any street," to "leave a space of at least six feet between the curb and the . . . automobile. . . ." It appeared that on the lot fronting on the street where the accident happened, a building was being erected; that debris therefrom had been

piled in the corner of the street, around which a fence or barricade had been constructed, and pedestrians traveling along the street on reaching the corner would be obliged to leave the regular walk, step into the street, and walk around the outside of this fence or barricade. The court charged the jury that this fence became the curb within the meaning of the ordinance, and that the appellant was guilty of violating the ordinance when he drove along the street if he did not keep his automobile six feet therefrom. This instruction is assigned as error, but we think it correct. The purpose of the ordinance was to keep vehicles, in rounding corners, out of the path usually taken by foot passengers, and the word curb was used as the most convenient term to mark one of the boundaries of the path, and not in a technical sense. When a fence was used to mark the boundary of this path it became the curb within the meaning of the ordinance.

The appellant objects to the words "or otherwise," in the sixth paragraph of the instructions quoted, arguing that they authorize the jury to find against the defendant if they find that he was guilty of any negligence whatsoever, whether within the issues made by the pleadings or not. But this court, after verdict, when no questions are raised as to the admissibility of the evidence, will treat the complaint as being as broad as the evidence, and hold any act of negligence proven to be within the issues. Under this rule, since it is not complained that the instruction goes beyond the evidence, the instruction cannot be held to be too broad.

In the last paragraph of the instructions quoted it will be noted that the court instructed the jury that if the negligence of the respondent contributed to her own injury "in any appreciable degree" then she could not recover. It is objected to this that the word appreciable as here used means "important" or "material;" and is equivalent to a charge that the negligence of the respondent to be a defense must be important or material. But it is evident that the proper sense of the phrase is "any degree capable of being appre-

ciated," "any degree capable of being ascertained or discerned." From the viewpoint of the appellant, therefore, there can be no error in the instruction.

The instructions requested we shall not notice in detail. In most instances they were embodied in the court's charge, in so far as they were material, not in the language of the request at all times, but in substance and effect, and this is all that is necessary to comply with a request. In so far as they were proper and not given, we do not find them sufficiently material as to require a reversal of the case. So, also, with the claim that the respondent was guilty of contributory negligence. The evidence on the question was sufficiently contradictory to make it a question for the jury, rather than one of law for the court.

The judgment is affirmed.

GOSE, MOUNT, and PARKER, JJ., concur.

[No. 9300. Department Two. March 28, 1911.]

THE STATE OF WASHINGTON, *Respondent*, v. GEORGE L. PEPOON, *Appellant*.[1]

INDICTMENT AND INFORMATION—OATH OF PROSECUTING ATTORNEY—AFFIDAVIT. Where an information is duly sworn to in an affidavit by the prosecuting attorney, who takes oath that he is the prosecuting attorney and that the information is true, it is sufficient without reciting that the averments were made on the oath of the prosecuting attorney.

CRIMINAL LAW—TRIAL—MISCONDUCT OF COUNSEL—ARGUMENT—APPEAL—HARMLESS ERROR. Rem. & Bal. Code, § 339, providing that no argument shall be allowed in the opening statement, is not violated by a lengthy and detailed statement of the facts, even if some slight inferences are drawn; and no prejudice results where counsel desisted on objection made, and nothing was said not fully justified by the testimony produced.

HOMICIDE—DEGREES OF OFFENSE—INSTRUCTIONS. In a prosecution for murder, the right of the jury to determine the degree of the

[1]Reported in 114 Pac. 449.

offense given by statute must be based on the evidence, and the court need not instruct thereon, where there was no evidence tending to show the commission of the lesser offenses.

SAME—EVIDENCE OF LESSER OFFENSES—SUFFICIENCY. In a prosecution for murder in the first degree by poisoning, there is no evidence to warrant instructions upon second degree murder or manslaughter, where it appears that the deceased was of unsound mind and in a highly nervous condition, and either in an attempt to allay such condition or to murder her, the defendants consulted as to the medicines to be given her, and administered the poison; since they were guilty of first degree murder or not at all.

HOMICIDE—VERDICT—DEGREES OF OFFENSE. A verdict of guilty as charged is sufficient in a prosecution for murder in the first degree, although the jury is required to find the degree.

HOMICIDE—TRIAL—VARIANCE. Upon an information for murder by administering poison on the 27th day of August, which caused the deceased to languish and die, it is not a variance to prove the deceased came to her death on the 29th.

CRIMINAL LAW—NEW TRIAL—MISCONDUCT OF JURY—VERDICT—IMPEACHMENT. On motion for a new trial, a conviction of murder cannot be impeached for misconduct of the jury by affidavits on information and belief.

SAME—MAGAZINES IN JURY ROOM. It is not reversible error, in a prosecution for murder, that the court permitted two jurors to be furnished with a magazine, it not appearing that there was anything in the magazines concerning the case, especially where the question is raised on motion for a new trial; since the presumption is that the court first censored the magazines.

CRIMINAL LAW—TRIAL—INDORSEMENT OF NEW WITNESSES—DISCRETION. It is not error to allow the name of a new witness to be indorsed on the information after the jury was sworn and the opening statement was made, where no surprise was claimed or continuance asked, and no abuse of discretion appears.

Appeal from a judgment of the superior court for Stevens county, Kennan, J., entered May 3, 1910, upon a trial and conviction of murder in the first degree. Affirmed.

John B. Slater and *J. A. Rochford*, for appellant.

The Attorney General, *Geo. A. Lee*, *Assistant*, and *H. G. Kirkpatrick*, for respondent.

DUNBAR, C. J.—The appellant was tried for murder in the first degree, in the superior court of Stevens county, Washington, was found guilty as charged in the information, and sentenced to life imprisonment in the penitentiary. The information upon which he was tried is as follows:

"H. G. Kirkpatrick, prosecuting attorney in and for the county of Stevens and state of Washington, comes here into court, and in the name and by the authority of the state of Washington, gives the court to understand and be informed that the said defendants, George Pepoon and Ray Wilcox, are hereby charged with the crime of murder in the first degree, committed as follows, to wit: That on the 27th day of August, A. D. 1909, in the county of Stevens and state of Washington, the said George Pepoon and Ray Wilcox, then and there being, did then and there unlawfully and feloniously, and with a premeditated design to effect her death, kill and murder Edith Pepoon, by then and there unlawfully and feloniously, and with a premeditated design to effect the death of the said Edith Pepoon, administering and giving to her, the said Edith Pepoon, strychnine, which said strychnine so administered by the said George Pepoon and Ray Wilcox was a deadly and dangerous poison, and which said strychnine so administered by the said George Pepoon and Ray Wilcox to the said Edith Pepoon did cause her to languish and die, and was by the said defendants administered and given unlawfully and without justifiable or excusable cause; contrary to the statute in such case made and provided, and against the peace and dignity of the state of Washington."

The appellant alone was tried, Ray Wilcox, who was informed against jointly with him, not having been arrested, by reason of his flight from the country.

The first assignment of error involves the sufficiency of the information, the contention being that it does not allege facts sufficient to constitute a crime under the laws of the state of Washington, in that the information for murder does not set forth that the averments were on the oath of the prosecuting attorney. Conceding the demand of the statute to be as contended for by learned counsel for appellant, we

think the requirements have been fully met by the information. It is true that the prosecuting attorney does not say in words that he makes the statements under oath, but he takes his oath that he is the prosecuting attorney, and that the information is true, and that it is made for the reason that the grand jury is not in session. The facts upon which the information is based are certainly set forth in the information, the truth of which is sworn to, and the information thereby becomes a part of the affidavit, which it is claimed the law demands. The cases cited by appellant do not sustain his contention. *State v. Minor*, 193 Mo. 597, 92 S. W. 466, involves a case where the information was held insufficient because it was not based upon the oath of the prosecuting attorney which, as we have seen, this information is. The other case cited, *State v. Platner*, 196 Mo. 128, 93 S. W. 403, is squarely against the appellant's contention. The information in that case is not disclosed by the opinion, but it may be presumed from what is said by the court that, on the question involved here, it was substantially the same as the information in this case. All that the record discloses is the following statement of the court:

"The first point presented on this appeal is as to the sufficiency of the information, which is claimed to be insufficient upon the ground that it is nowhere stated therein that it is made upon the oath of the prosecuting attorney, nor upon his official oath. The information is in the language of the statute, and duly verified by the prosecuting attorney in accordance thereto. It is sufficient."

The second assignment is based upon the alleged error of the court in permitting the prosecuting attorney to make an argument to the jury while making his opening statement of the facts which he expected to prove, in violation of § 1, chap. 86, Laws 1909, p. 184 (Rem. & Bal. Code, § 339), which provides that nothing in the nature of comments or arguments shall be allowed in opening a case. The appel-

lant has contented himself with the general statement that there was a flagrant violation of this law, without specifying the particular language which it is claimed constituted the argument. We have, however, carefully read the opening statement, which is very circumstantial and lengthy, and are not able to say that the criticism is justified. It is sometimes difficult for one to make a long, detailed statement of facts without seeming to draw some slight inferences. It would probably be permissible for an attorney in his opening statement to say, "Gentlemen of the jury, to show the animus in this case we will prove the following state of facts," stating them. That would not be different in principle from stating, "We will prove such and such a state of facts, thereby showing the animus;" and that is the most that could be said of the statement in this case. And whenever such statement was objected to, counsel cheerfully desisted, always disclaiming any intention of making an argument. The object of this inhibition doubtless is to prevent prejudicing the minds of the jurors by injecting into the statement arguments which would not be admissible under the testimony, but which might maintain lodgment in the minds of the jurors and affect their verdict. But in this case no such result could have obtained, for the record shows that an argument just such as it is claimed was made would have been fully justified by the testimony which was produced; so that, even conceding appellant's contention, there was no prejudice.

It is next contended that the court erred in giving instruction No. 4, in that the jury was not instructed upon the law of murder in the second degree and of manslaughter. The fourth and fifth instructions upon that subject were as follows:

"(4) The statute of this state defining murder in the first degree so far as this case is concerned is as follows: 'The killing of a human being, unless it is excusable or justifiable, is murder in the first degree when committed with a

premeditated design to effect the death of the person killed.'

"(5) The statutes of this state further provide that no person shall be convicted of murder unless the death of the person alleged to have been killed and the fact of the killing by the defendant as alleged are each established as independent facts beyond a reasonable doubt."

It is no doubt true that the crime of murder includes the lesser crimes of murder in the second degree and of manslaughter, and it is equally true that the jury has a right to determine the degree of crime which was committed. But that determination must, of course, be based upon evidence. That is all that gives the determination any value. The anxiety of the law is to give the defendant the full benefit of trial by jury on all questions of fact, and it will not give its sanction to a farcical and arbitrary determination of any alleged fact which the jury has had no possible means of determining. If the defendant had been informed against for manslaughter and the state had failed to produce any evidence tending to show the commission of manslaughter, as it did fail in this case to do, there would have been no duty resting upon the jury, and it would clearly have been the duty of the court to discharge the jury because there was nothing upon which the function of a jury could take hold, and to discharge the defendant. The legal function of the jury is not at all changed because the question for determination arises upon an information in the first degree. We are, of course, not speaking with reference to weight of testimony, but of a case where there is no testimony whatever to weigh tending to show the commission of the lesser degree. Such is the case at bar with reference either to murder in the second degree or to manslaughter. The testimony shows that the wife of appellant, whom he is charged with murdering, was of unsound mind, and on the day of her death was in a highly nervous condition; that either in an attempt to allay this condition, or for the actual

purpose of murdering her, the appellant, with the aid of Wilcox, who by appellant's direction was waiting upon his wife, consulted as to where the medicine was which they desired to administer to her; that they secured the medicine, put it in a glass tumbler, and urged her to drink it; and that she did drink it, and immediately went into spasms and died from the effects of it. Under such circumstances one of two things is certain: either the potion was administered by mistake, in which event no degree of murder was committed, or it was administered with a premeditated, deliberate, and malicious intent to murder. There is no room under the testimony for any other theory, and no testimony whatever upon which any other verdict than the one rendered could have been based. Hence, it would be farcical to reverse the judgment on the ground complained of.

It is true that some of the earlier cases from this court seem in a measure to sustain appellant's contention, but the cases relied upon were based upon a misconception of what was actually decided in *State v. Greer*, 11 Wash. 244, 39 Pac. 874. There, it is true, it was held that, under an information similar to the information in this case, charging the defendant with the crime of murder in the first degree, the defendant might be convicted of murder in the second degree or of manslaughter, under the provisions of the code which undoubtedly so provide. But in that case error was alleged because the court had so instructed. The record did not contain any statement of facts or bill of exceptions, so that it could not be determined on the appeal whether the instructions were justified or not, and the court properly held that every reasonable presumption would be indulged in aid of the judgment. But in *State v. Robinson*, 12 Wash. 349, 41 Pac. 51, 902, it was squarely held that the testimony controlled the instructions and the verdict, and that it was the duty of the jury, if they entertained a reasonable doubt of the appellant's guilt of the only crime

which the evidence tended to prove, to acquit and not compromise with that doubt by finding him guilty of a lower grade of offense. In *State v. McPhail*, 39 Wash. 199, 81 Pac. 683, after a review of our own decisions as well as of the authorities generally, it was squarely decided that a defendant can only be convicted of a lesser degree when there is testimony to sustain such conviction.

Probably the latest expression of this court on this question is in *State v. Kruger*, 60 Wash. 542, 111 Pac. 769, where the doctrine announced above was reaffirmed, and it was said:

"It is true that the greater includes the less, but the defendant is not guilty of either unless the testimony brings him within the definition of a crime. It was never the intent of the law to submit a possible verdict upon a so-called included crime because included in law. It must be included in fact, and by the facts of the particular case."

The fourth contention is that a verdict of guilty as charged is not a sufficient finding of the degree where the statute requires the degree to be found by the jury. In addition to the facts discussed above, viz., that under the testimony no other degree of guilt could have been found by the jury, there is no difficulty in interpreting this verdict. It was as follows:

"We, the jury in the case of The State of Washington, Plaintiff, vs. Geo. Pepoon, Defendant, find the defendant guilty of the crime as charged in the information."

So that it was just as certainly a verdict of murder in the first degree as though it had been so stated in so many words, and the court would have no difficulty whatever in pronouncing the proper judgment. Any verdict which clearly indicates the conclusion reached by the jury is sufficient. *State v. McCormick*, 56 Wash. 469, 105 Pac. 1037.

The conclusion we have reached on the fourth assignment disposes of the fifth, viz., that the court erred in the rendition of the judgment and sentence on the verdict of the

jury. There seems to be no merit in the contention that the judgment is illegal because the information charged the commission of the crime on the 27th day of August, 1909, and the testimony was to the effect that the deceased came to her death on the 29th day of August.

It is also urged that the court erred in overruling the defendant's motion for a new trial on the ground of misconduct of the jury. The affidavits tending to show misconduct were passed upon by the court and the motion overruled, and from a reading of the whole record we think there was no abuse of discretion. We first held in *State v. Murphy*, 13 Wash. 229, 43 Pac. 44, that a verdict in a prosecution for murder could not be impeached for misconduct of the jury, by an affidavit based upon information and belief as to the facts charged. We said that the presumptions surrounding the verdict of a jury are necessary, and can only be overcome by the competent testimony of some one having knowledge upon the subject; and this has been the uniform ruling of this court. *State v. Simmons*, 52 Wash. 132, 100 Pac. 269; *Haggard v. Seattle*, 61 Wash. 499, 112 Pac. 503.

It does incontrovertibly appear, however, that two of the jurors were each furnished with a magazine by consent and direction of the court, and on this state of facts it is contended by appellant that reversible error was committed, under the rule announced in *State v. McCormick*, 20 Wash. 94, 54 Pac. 764. In that case a judgment was reversed because the court, without permission of the defendant, delivered to certain of the jurors letters and a paper addressed to them, although the judge stated that he had examined the letters and they had been in transit for several days, and that he had examined the paper and saw that it contained nothing relative to the cause on trial; this court saying, in passing upon the question, that it was conceivable that the envelopes containing the letters might have been opened and communications to the jury in-

serted therein, and the envelopes again sealed in such a manner as to escape detection.

It is somewhat difficult to distinguish that case in principle from the case at bar, although the somewhat impossible supposition indulged in that case in reference to tampering with the sealed letters would not obtain here. There is no showing made, and no claim, that there was anything in the magazines concerning the case being tried. If there were any data presented in support of the motion for a new trial on this ground, they were considered by the court; and, in the absence of some showing to the contrary, we must conclude that the magazines had been censored by the judge before he directed them to be delivered to the jurors. But in addition to this, we think *State v. McCormick* was an extreme case and does not reflect the more modern ideas on this subject. While the rights of the defendant in a criminal action must be maintained, when once the court indulges in consideration of bare possibilities and reverses judgments because it was within the range of possibility that a juror might have received a communication from the outside, the court will wander from the path of reasonable caution into the hazy realms of fancy; for when imagination waves its magic wand, sober calculation is put to flight. In the case cited, the court, by extending its imagination a hair's breadth, might have concluded that it was conceivable that a communication concealed in a sandwich or biscuit would reach a juror, or would reach him in one of many other ways which are conceivable. In addition, we must indulge some presumptions in favor of the integrity of the jury. It is a branch of the judiciary, and if we assume that jurors are so quickly forgetful of the duties of citizenship as to stand continually ready to violate their oath on the slightest provocation, we must inevitably conclude that a trial by jury is a farce and our government a failure. This question being raised on a motion for new trial, where there is no showing even pointing to any invasion of the de-

fendant's rights, but the claim of error resting exclusively on the theory that some juror might possibly have been subjected to undue influence, the assignment, under the great weight of authority, cannot be sustained. As to the later views of this court, see *State v. Aker*, 54 Wash. 342, 103 Pac. 420.

The last assignment is that the court erred in permitting the prosecuting attorney to endorse upon the information, over the objection of the defendant, the name of Eugene Travis, after the jury were sworn and after the opening statement to the jury had been made by the prosecuting attorney. The record shows that no continuance was asked on account of any alleged surprise, nor any showing made of any prejudice by reason of such endorsement. It was held by this court, in an early case, to wit, *State v. John Port Townsend*, 7 Wash. 462, 35 Pac. 367, that where a defendant in a criminal action does not seek a continuance on the ground that the names of certain witnesses for the state had not been endorsed on the information before trial, but proceeded with the trial, such an endorsement would not warrant a reversal of the judgment; and such has been the uniform ruling of this court. We have also held that permission by the court to endorse witnesses' names on the information after trial commenced is largely discretionary, and not ground for reversal in the absence of abuse of discretion. *State v. Quinn*, 56 Wash. 295, 105 Pac. 818; *State v. Carpenter*, 56 Wash. 670, 106 Pac. 206; *State v. Le Pitre*, 54 Wash. 166, 103 Pac. 27.

There having been no prejudicial error committed, the judgment will be affirmed.

CHADWICK, CROW, and MORRIS, JJ., concur.

[No. 8837. Department One. March 29, 1911.]

CHICAGO, MILWAUKEE & PUGET SOUND RAILWAY COMPANY, *Appellant*, v. L. L. TRUE *et al.*, *Respondents*.[1]

EVIDENCE — VALUE OF LAND — OPINIONS — WITNESSES — CROSS-EXAMINATION — DISCRETION. Upon an issue as to the value of a lot used for the storage of oil, which business could not be carried on within the fire limits, it is proper on cross-examination to ask a hypothetical question as to the value that would be added by use of the lot under specified conditions for a "profitable oil business," where there was evidence that there was no other location in the city for the carrying on the business "with equal profit;" it being discretionary to allow great latitude on cross-examination of witnesses as to values.

APPEAL — REVIEW — HARMLESS ERROR — IMMATERIAL EVIDENCE. Upon an issue as to the value of a lot used for storing oil, it is not prejudicial error to allow the owner to testify that he was the only competitor of the Standard Oil Company in the city, although the evidence was immaterial.

SAME — HARMLESS ERROR — EVIDENCE — CURED BY INSTRUCTIONS. Upon an issue as to the value of a lot condemned, it is not reversible error to allow the owner to testify as to the business for which the lot was used and the volume or extent of such business, when the jury were instructed that the business was shown solely for showing the use to which the property was adapted and they could not consider the volume or extent of such business or injury thereto.

SAME. Upon an issue as to the value of a lot, where, in an answer to a question as to whether witness had ever heard of a sale in the vicinity at plaintiff's valuation, the witness stated that he had bought a lot at a certain price, paid part in cash and balance in other property, it is not prejudicial error to refuse to strike the answer, allowing it to go to the jury "for what it is worth."

EVIDENCE — VALUE OF PROPERTY — OFFERS. Upon an issue as to the value of a lot, it is not competent to prove in rebuttal that property in the vicinity had been offered and listed at specified prices.

TRIAL — MISCONDUCT OF COUNSEL — ARGUMENT. Upon objections to argument of counsel in stating that a certain fact was proved, the court discharges its duty in admonishing the jury that they must disregard the statements of counsel and be guided by their own recollection of the evidence.

[1]Reported in 114 Pac. 515.

APPEAL—REVIEW—HARMLESS ERROR—ARGUMENT. A verdict awarding damages for a lot condemned will not be reversed for comment by counsel on the immaterial fact that the owner was the only competitor in the city of the Standard Oil Company, the relator being in no way connected with such company.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered February 8, 1910, upon the verdict of a jury assessing damages in proceedings to condemn land for railway purposes. Affirmed.

Cullen & Dudley (*H. H. Field*, of counsel), for appellant.
Nuzum & Nuzum, for respondents.

GOSE, J.—Plaintiff brought this action to condemn and appropriate an improved lot in the city of Spokane. After the order of necessity for the appropriation had been entered, the case was tried to a jury for the purpose of determining the value of the property. The plaintiff has appealed from the judgment entered upon the verdict.

The respondents had erected a warehouse and oil tanks upon the lot, and were engaged in selling oil and gasoline by both wholesale and retail. Their tanks were so situated to the Inland Electric road that the oil was carried from its cars into the receiving tanks upon the premises by means of pipes. The business cannot be carried on within the fire limits of the city.

Counsel for the respondents was permitted, over the appellant's objection, to ask its expert witnesses the following question on cross-examination:

"If a profitable oil business was carried on there, if it was carried on for some time—I am not allowed to tell you how much the profits were, but I will say it was a profitable business for Mr. True, and by reason of its location in that district in front of the Standard Oil Company doing business in competition with the Standard Oil Company, and by reason of its location on the Inland he was able to get car loads of oil delivered to him when he could not unless he

was on the Inland, would that in any way add to the value of the property?"

In overruling the objection, the court said that the question was proper as a test of the qualification of the witness, "and what he takes into consideration." It is argued that there is no evidence to justify the hypothesis, and that hypothetical questions are not permissible even upon cross-examination, unless based upon some evidence in the case. The respondent True testified that he had not been able to get any railroad other than the Inland to deliver oil to his storage tanks on the lot. He also testified that his business at certain seasons of the year is largely of a retail nature, and that if the lot was appropriated, he would have to go out a mile further from the business center of the city to get a location on the Inland road. Relative to the elements of damage in this respect, the court instructed the jury:

"And if you find from the evidence in this case that the land sought to be condemned herein has been devoted to any particular use or business by the owners thereof, the defendants herein, and that they are now conducting said business, and that said business so conducted by the owners has been profitable, you should take that fact into consideration in fixing the fair market value of the land. And you are instructed that all the evidence admitted in this case relating to the business of the defendants as conducted upon the premises sought to be condemned, and the character, nature and extent of such business, should only be considered by you in arriving at the question of what is the fair market value of the premises to be condemned; and if you find from the evidence in this case that no other location in the city of Spokane can be had for the carrying on of said business, or for the carrying on of said business with equal profit, you may also consider that fact in arriving at a decision as to the fair market value of the land sought to be condemned."

The inquiry was within the instruction. Moreover, if the jury believed the testimony of the respondent True, they might well conclude that there was no other place in the

city where the respondents' business could be carried on "with equal profit"; and counsel had a right to inquire whether that aspect of the matter had been considered by the witness in fixing a value upon the property.

"Great latitude is allowed on the cross-examination of an expert witness. The cross-examiner is not confined to the theory of the direct examination, but, on the contrary, he may propound hypothetical questions, leaving out facts assumed on the direct examination and putting in such facts as he thinks the evidence establishes. Indeed, 'he may assume almost any state of facts' for the purpose of testing the knowledge of the witness and the weight of his evidence, and an appellate court will seldom interfere with the discretion of the trial court in permitting such questions." 2 Elliott, Evidence, § 1124.

"The trial judge has a large discretion in allowing cross-examination of witnesses where market value is involved, and where expert witnesses are resorted to to establish such value." *Seattle & Montana R. Co. v. Roeder*, 30 Wash. 244, 70 Pac. 498, 94 Am. St. 864.

The same rule is announced in the following authorities: 5 Ency. Evidence, p. 632; *Bever v. Spangler*, 93 Iowa 576, 61 N. W. 1072; *Taylor v. Star Coal Co.*, 110 Iowa 40, 81 N. W. 249; *Mileham v. Montagne* (Iowa), 125 N. W. 664.

Counsel was permitted to ask the respondent True: "Now, what oil do you handle as distinguished from Standard oil?" He answered, that he was engaged in the business of selling oil and gasoline at retail and wholesale; that he handled only the oil of independent companies, and that he was the only competitor of the Standard Oil Company doing a wholesale business in the city of Spokane. This is assigned as error. While we confess that we do not perceive the materiality of the testimony, as to the name of the respondents' competitor in business, we cannot think that the evidence worked such prejudice as to require a reversal. Appellate courts must assume that jurors, mindful of their oaths, will not be swept off their feet by the sound of a name. The

issue to be determined was the value of the lot sought to be condemned, measured by all its capabilities.

The respondent was permitted to testify as to the territory through which their business extended. This is assigned as error. It is argued that, in actions to condemn real estate, damages to the business carried on upon the premises taken are not recoverable by the owner of the property. A long line of authorities are cited in support of this view. On the other hand, the respondents have cited a line of authorities which they contend permit the consideration of the question of damages to business. Upon this question the court instructed the jury as follows:

"And in this connection I charge you that, although evidence has been permitted to be introduced with reference to the business conducted upon the property here sought to be condemned, such evidence was admitted solely for the purpose of showing the use to which this property was adapted, and should be considered by you for such purpose only. And you are instructed that you are not to consider the volume or extent of such business, if any appear, or the profits, if any, as a measure of the market value of the property; neither should you take into consideration in determining the amount of damages to be awarded for the taking of the property condemned, any injury to such business or any loss of profits of such business, even if such injury or loss appear from the evidence. It is the property of the defendants, not their business, which is condemned by the petitioner, and it is for this property only that you are to award compensation."

There is no exception to the instruction, and there was no error in the admission of the testimony under the limitation placed upon it by the court.

A witness for the respondents was asked on cross-examination if he had ever heard of a sale in the vicinity of the respondents' property at the price he had placed upon it. He answered that he had; that he had bought a lot for $52,000, $25,000 cash and $27,000 in property. The appellant moved to strike this testimony, upon the ground that evi-

dence as to prices should be confined to sales for money, and that evidence as to trades or exchanges of property is not admissible. The motion was denied, the court stating: "It goes to the jury for what it is worth." We think, as limited by the court, the error, if any, was without prejudice. *Seattle & Montana R. Co. v. Gilchrist*, 4 Wash. 509, 30 Pac. 738.

A witness for the respondents testified on his direct examination that the property was worth $40,000 to $45,000. On cross-examination he said that if certain other property had been offered and listed at prices stated by the examiner, he would say that the value he had placed upon respondents' property was "high." But to what extent he did not state. On rebuttal the appellant sought to prove that the property referred to in his cross-examination had been offered and listed at the prices stated to the witness. Error is suggested in the rejection of the testimony. The purpose of rebutting testimony is, as counsel suggests, to repel or counteract the effect of evidence offered by the adverse party. We have, however, repeatedly held that it is not competent to prove what the owner has been offered for his property. *Williams v. Hewitt*, 57 Wash. 62, 106 Pac. 496. Nor is it competent to prove offers for adjacent or similar property, or the prices at which the owners have offered it for sale. 2 Lewis, Eminent Domain (3d ed.), § 666. Perhaps the chief vice of the proffered testimony is that it would open the case to collateral inquiry which might be pursued indefinitely.

In arguing the case to the jury, counsel for the respondents twice stated that the respondent had testified that he could not get cars delivered to him except on the Inland road. In answer to appellant's motion that the remark be stricken, the court said: "I instruct the jury again not to pay any attention to what counsel says, unless it agrees with their own recollection of the evidence." He later instructed the jury to the same effect. The respondents' testimony was that the roads, other than the Inland, would not deliver cars upon the prem-

ises sought to be appropriated. The trial judge cannot be expected to remember all the testimony in the case. The evidence was before the jury, and it was their province to determine, not only what the evidence was, but its weight and credibility as well. We think the court discharged its duty when, in response to the motion, it admonished the jury that they must be guided in their deliberations by their own recollections of the evidence. Moreover, the inference reasonably deducible from a fact is as competent evidence as the fact itself, and counsel may properly point out and comment upon such inferences. It must be assumed that the argument falls upon the ears of reasonable and unprejudiced men. If this presumption may not be indulged, trial by jury is a travesty.

Finally, it is said that a new trial should have been granted because of the misconduct of counsel in pressing upon the attention of the jury the fact that the Standard Oil Company was favored by the railroads, and was the only competitor of the respondents in the wholesale trade. As we have said, the testimony that the Standard Oil Company was a competitor of the respondents was immaterial and should not have been admitted. It does not follow, however, that its admission or the comment of counsel thereon worked such prejudice as to require a reversal of the case. If it had been shown that John Smith was the competitor, we assume that it would not be contended that error resulted from that fact. We cannot judicially notice the fact that the name of the Standard Oil Company is so odious in this state that the mention of it would so inflame the minds of jurors that they would disregard their oaths and inflict their prejudices upon a litigant innocent of participation in the alleged sins of that company. A reasonable latitude must be allowed counsel in presenting a case to the jury. *Rangenier v. Seattle Elec. Co.*, 52 Wash. 401, 100 Pac. 842. If cases were reversed for every technical error, a jury trial would never end. We have repeatedly held that a case will not be reversed for error that, upon the entire record, does not appear to be prejudicial. The jury viewed the prem-

ises, and had an opportunity to observe for themselves the weight that should be given to the testimony of the respective witnesses.

The judgment is affirmed.

FULLERTON, MOUNT, and PARKER, JJ., concur.

[No. 9285. Department One. March 30, 1911.]

JOHN A. PEACOCK *et al.*, *Respondents*, v. L. L. RATLIFF *et al.*, *Appellants*.[1]

WITNESSES—CROSS-EXAMINATION. It is not error to refuse to require a witness on cross-examination to answer a question the second time, after having fully answered.

EVIDENCE—CONCLUSION OF WITNESSES—HUSBAND AND WIFE—COMMUNITY OBLIGATIONS. In an action upon the admitted contract of a married man, it is not error to sustain an objection to a question as to whether the defendant had ever incurred an indebtedness for the benefit of the community, as the same is a mere conclusion of the witness.

HUSBAND AND WIFE—ACTIONS—INSTRUCTIONS—COMMUNITY DEBT—PRESUMPTIONS—CONTRACT FOR ATTORNEY'S FEES. In an action against a husband and wife for attorney's fees, it is proper to instruct that if the contract was made by the husband and the services rendered the defendants were liable and that the contract was presumptively for the benefit of the community, which presumption would be conclusive if there was no evidence to overcome it.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered June 29, 1910, upon the verdict of a jury rendered in favor of the plaintiffs, in an action on contract. Affirmed.

Robertson & Miller, for appellants.

Peacock & Ludden, for respondents.

MOUNT, J.—The plaintiffs brought this action to recover against the defendants upon two alleged causes of action. The first was based upon an express contract, and the other was

[1]Reported in 114 Pac. 507.

for the reasonable value of services rendered as attorneys, in addition to those embraced in the contract alleged in the first cause of action. The defendants, by answer, denied the allegations of the complaint. The case was tried by a court and a jury. Verdict was rendered in favor of the plaintiffs for the amount claimed. This appeal is prosecuted by the defendants from a judgment entered upon the verdict.

The appellants argue that the court erred in sustaining plaintiffs' objection to the following question:

"Now, I will ask you the question that I asked before in a different way and see if you can answer it. Did you attend to seeing that the resolution of the board was adopted authorizing transfer of this contract to Mr. Ratliff?"

This question was asked of Mr. Ludden, one of the plaintiffs, by counsel for defendants, who was cross-examining the witness. The witness had already answered that he did not, and that he had nothing to do with the corporation referred to as "the board;" that his employment was by Mr. Ratliff personally. There was clearly no error in refusing to require the witness to again answer the question.

Appellants also argue that the court erred in sustaining an objection to the following question: "Did you ever incur any indebtedness of this nature for the benefit of the community of yourself and Mrs. Ratliff?" The plaintiff had called the defendant L. L. Ratliff originally to the stand, and asked him if he was married, and the name of his wife. Thereupon counsel for defendants asked him the question quoted. The answer was: "No, sir." Counsel for plaintiffs then said: "We object. He can state the facts if he wants to." This objection was sustained, which was clearly correct. The answer was simply the conclusion of the witness. The witness did not even deny making the contract, or that plaintiffs had performed the services.

The court instructed the jury as follows:

"Upon the first cause of action it is for you to determine from the evidence whether the contract was entered into be-

tween the defendant L. L. Ratliff and W. H. Ludden on behalf of the firm of Peacock & Ludden; and if you find that the contract was entered into, then you will next have to determine whether the services described in the contract were performed by the plaintiffs, and if you find that the contract was entered into and that the services were performed, then the plaintiffs should be entitled to a verdict upon that cause of action in the sum of $2,500 against the defendants, both of them."

"I will instruct you that, where a man is married, that any contract which he enters into involving a money transaction is presumptively for the benefit of the community; that is, presumptively for the benefit of himself and wife, and any indebtedness incurred in that way would be *prima facie* an indebtedness of the community. There is no question of law there because the defense has offered no evidence to show that this is not a community debt; hence, if you find that the contract was made and the services performed, your verdict will be for the plaintiffs in the sum of $2,500, and against both the defendants."

Appellants object to the first of these instructions, and say:

"This instruction tells the jury in so many words that, if they find there was a contract entered into and services performed under it, the plaintiffs were entitled to recover against both of the defendants."

What the court told the jury was, if they found that the contract had been entered into between the defendant Ratliff and the plaintiffs, and if the contract had been performed, then the plaintiffs should recover. The instruction means nothing else, and the jury were not misled. The instruction was correct. The second instruction is also the law. *Calhoun v. Leary*, 6 Wash. 17, 32 Pac. 1070; *Bryant v. Stetson & Post Mill Co.*, 13 Wash. 692, 43 Pac. 931.

The appellants make no point upon the form of the judgment. They do not claim that a separate judgment was entered against the wife, or a judgment which could be enforced against her separate property. But if such question may be raised, it is apparent from the whole record that the judgment rendered is one against the community only.

The verdict was right under the undisputed evidence, and there is no merit in any of the appellants' points, nor in this appeal. The judgment is therefore affirmed.

DUNBAR, C. J., and PARKER, J., concur.

FULLERTON, J. (concurring)—The instructions quoted in the majority opinion are erroneous, since they authorize a personal judgment against the wife on a community debt incurred by the husband. Inasmuch, however, as the appellant does not object to them on that ground, and does not complain of the fact that such a personal judgment was entered, I concur in the order of affirmance.

GOSE, J., concurs with FULLERTON, J.

[No. 9226. Department One. March 31, 1911.]

COMFORT A. GLEESON, *Respondent*, v. J. S. LICHTY, *Appellant*.[1]

BILLS AND NOTES—ACTIONS—FINDINGS—ADMITTED INDORSEMENT—EFFECT. An indorsee of a note in blank being liable as an indorser, if dishonored and notice given, regardless of actual consideration, under Rem. & Bal. Code, §§ 3458, 3457, and 3420, a finding that by the indorsement, which was admitted, defendant promised to pay the note etc., is not error, where by other findings, dishonor and notice were established.

BILLS AND NOTES—INDORSEES—NOTICE AND PRESENTMENT — EVIDENCE—SUFFICIENCY. There is sufficient evidence to sustain a finding that a note remained in the custody of an indorser, as agent of the owner, from the time it was made until it came due, so that notice of dishonor was not necessary, where he had had such possession as such agent and delivered it to an attorney for collection, since it was under his control and constructively in his possession.

SAME—NOTICE OF DISHONOR—SUFFICIENCY. Where an indorser of a note had its custody for collection as agent for the owner it was his duty to present it for payment, and knowing that the maker was in the hands of a receiver and that presentment would be an idle ceremony, he was not entitled to further notice as an indorser, under Rem. & Bal. Code, § 3486, providing for either written or oral notice.

[1]Reported in 114 Pac. 518.

Appeal from a judgment of the superior court for Spokane county, Webster, J., entered December 13, 1909, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on a promissory note. Affirmed.

Davis & Davis and *Frank H. Kinsell*, for appellant.

Warren W. Tolman and *John King*, for respondent.

MOUNT, J.—The plaintiff brought this action against C. A. Jones, J. S. Lichty and wife, and E. C. Rumens and wife, to recover upon a note for $2,000, upon which $500 had been paid. The note was made by Farmers' Mutual Live Stock Insurance Company to the plaintiff. Two causes of action were alleged: (1) That the defendants C. A. Jones, J. S. Lichty and C. J. Rumens were liable on the note as guarantors; (2) that they were liable as indorsers, and that due presentment and notice to said indorsers had been given as provided by law. The defendants by their answer admitted the making of the note by the insurance company, and that they indorsed the note in blank, but denied the other allegations of the complaint. Upon these issues the cause was tried to the court without a jury. Findings of fact and conclusions of law were made in favor of the plaintiff, and a judgment was entered against the defendants C. A. Jones, J. S. Lichty and C. J. Rumens, for the amount prayed for in the complaint. The trial court subsequently granted a motion for a new trial as to defendants Jones and Rumens, but denied the motion as to Mr. Lichty, who alone appeals from the judgment rendered.

The trial court found as a fact:

"That on the said 1st day of May, 1908, before the delivery of said note to the said Comfort A. Gleeson, the defendants Chas. A. Jones, J. S. Lichty, and C. J. Rumens, for a valuable consideration, by their indorsement in writing upon said promissory note, promised and agreed to pay said note at

maturity in case of default in payment thereof by said Farmers' Mutual Live Stock Insurance Company."

Appellant argues that this finding is error because it is one of mixed law and fact, and also because it is not a correct deduction from the law and the evidence. It was admitted by the answer that the defendant indorsed the note in blank. This made him liable as an indorser (Rem. & Bal. Code, § 3458), and he thereby engaged that the note would be paid according to its tenor, and that, if dishonored and notice given, he would pay the amount thereof. Rem. & Bal. Code, § 3457. Whether there was an actual consideration for the indorsement is immaterial, because, without consideration, he was liable to the holder for value. Rem. & Bal. Code, § 3420. This finding, standing alone without other facts, might be subject to the objection that it was not sufficient to base a judgment upon because it omitted notice of dishonor; but these facts were found in other findings. There was, therefore, no error in the finding, for as far as it goes it follows from the admission in the answer.

The court made the following finding:

"That on and prior to the 1st day of May, 1908, the said J. S. Lichty was the agent of the said Comfort A. Gleeson in the making and collection of loans for her; that on the making and delivery of said note of the Farmers' Mutual Live Stock Company on the said 1st day of May, 1908, the said Comfort A. Gleeson delivered said note to the said J. S. Lichty, for the purpose of making collection thereof at maturity, and said J. S. Lichty received said note from said Comfort A. Gleeson for such purpose, and said note remained in the custody of said J. S. Lichty as such agent from the 1st day of May, 1908, until said note was delivered to her by said J. S. Lichty on the 3d day of May, 1909."

Appellant argues that this finding is not supported by the evidence. It appears that, at the time the note was executed, Mr. Lichty was the secretary and treasurer of the Farmers' Mutual Live Stock Company, the maker of the note. He was also agent for Mrs. Gleeson and loaned money for her. He

made this loan to his company, and signed the note as secretary and treasurer. He also indorsed the note in blank on the back of it. At the time the note matured, which was Saturday, May 1, 1909, a legal holiday, the insurance company was insolvent and in the hands of a receiver. Mrs. Gleeson had at all times depended upon Mr. Lichty to transact her business for her, and on the morning the note became due she called upon Mr. Lichty at his office and told him she had come for her money. It is true that Mr. Lichty testified that he turned this note over to one Mr. Pence, an attorney at law, together with other notes, several months before the note in question matured, and at that time Mr. Pence had it in his possession; that he told Mrs. Gleeson that he had turned all her notes over to Mr. Pence for collection, and that she made no objection thereto; that he also told Mrs. Gleeson that she would have to go to Mr. Pence for the note. Mr. Pence also testified that the note had been in his possession, but he was not clear that the note was in his possession upon the 3d day of May, 1909. Mrs. Gleeson, however, testified that the note was not in the hands of Mr. Pence upon the day it became due, and that on the 1st day of May, 1909, she called upon Mr. Lichty for payment; that on the 3d day of May, being the first business day after maturity, she again called upon Mr. Lichty at the request of her attorney and demanded the note, and that he delivered the note to her and she took it to her attorney, Mr. Tolman, who thereupon mailed notices of nonpayment and dishonor to each of the indorsers.

There is, in our opinion, sufficient evidence in the record to sustain the finding that the note remained in possession of Mr. Lichty from the time is was made until May 3, 1909. But, if we assume that the note was not in his actual possession, it was clearly under his control, and therefore constructively in his possession. He gave a number of notes to Mr. Pence for collection merely, and he notified Mrs. Gleeson to that effect, and Mrs. Gleeson made no objections thereto.

But we find nothing in the record to show that he relinquished his agency in any way, or that Mrs. Gleeson had consented that his agency should be transferred to another person. She considered him her agent, and looked to him at all times for the transaction of business for her, up until the note was not paid, when she employed another attorney to collect the same. Mr. Lichty was therefore responsible to her, and the notes in the possession of Mr. Pence were under Mr. Lichty's control. There was no error in the finding upon either theory.

Appellant argues that the note was not presented for payment to the maker on the 3d day of May, 1909, nor to the indorsers, and that no notice was given. As we have seen above, the note was in possession of Mr. Lichty, or under his control, at the time it became due. When the note was made, Mr. Lichty was an officer of the insurance company, the maker of the note. He was the person to whom Mrs. Gleeson looked for payment of the note. He was also her agent to collect the note. At the time the note matured, the insurance company was in the hands of a receiver, and Mr. Lichty was not in control of the affairs of the company. The evidence is not clear that Mrs. Gleeson knew this fact, but that we think is immaterial because it was Mr. Lichty's duty to present the note for payment. If he did not do so, it was because he knew that such presentment would be an idle ceremony. He had the note in his possession on the day it should have been paid. He knew that it was not paid. He was not entitled to further notice as an indorser. Rem. & Bal. Code, § 3486. Such notice was sufficient to bind him as an indorser.

Other errors alleged are covered by what we have said above. We need not consider the sufficiency of the notice which was sent to other indorsers, because that question is not involved upon this appeal. There is no error, and the judgment is therefore affirmed.

DUNBAR, C. J., PARKER, GOSE, and FULLERTON, JJ., concur.

[No. 8867. Department One. March 31, 1911.]

I. M. WOMACH *et al.*, *Respondents*, v. CASE THRESHING MACHINE COMPANY, *Appellant*.[1]

CORPORATIONS—ACTIONS—SERVICE OF SUMMONS—AGENTS. Under the statute authorizing actions against a foreign corporation doing business in this state by serving of summons on any agent within the state, a domestic corporation appointed the agent at L. of a foreign corporation under a contract to sell its machinery for the season of 1909, at the prices and on the terms fixed by the principals, and account for the proceeds, is an agent upon whom service of summons may be made.

PRINCIPAL AND AGENT—POWERS OF AGENTS—LIMITATIONS—SALES. A contract for the sale of a separator, providing that general agents of the seller had no general agency powers, does not limit the powers of an agent sent by the company to deal with reference to conditions arising subsequent to the execution of the contract, when it was found that the machine was unable to do its work.

SALES—CONTRACTS—WARRANTY—TRIAL BY BUYER. A contract for the sale of a separator, providing for notice if the machine failed to comply with the warranty after a trial of ten days, does not require a full ten days' trial, but only that a sufficient trial be given to demonstrate that it was incapable of doing its work.

SALES—CONTRACT—WARRANTY —NOTICE— DEFECTS— SUFFICIENCY. Where a contract for the sale of a separator provided that notice be given the seller of the failure of the machine to comply with the warranty, the fact that the buyer had purchased another machine before the notice was sent does not affect the timeliness of the notice.

SAME. Under a contract for the sale of a separator, providing that notice of defects shall specify the defective part, a notice that the separator would not thresh and save the grain is sufficient, where the fault lay with the separator, and the cause could not be ascertained by the buyer or the seller's experts.

SALES—CONTRACT—CONSTRUCTION. A clause in a printed form of a contract for the sale of a separator providing that defects as to one article should not release the buyer from the obligation of paying for the others, has no application to the distinct parts of the separator and its furnishings, where they were all parts of one machine and useless in case the separator failed to thresh the grain.

[1]Reported in 114 Pac. 509.

SALES—WARRANTY—WAIVER OF CONDITIONS. The seller of a separator waives its right to claim that the purchaser had not complied with the covenants of warranty, where after notice, and after its experts were unable to remedy the defect, the seller gave directions as to the disposition of the machine and refused to furnish another.

Appeal from a judgment of the superior court for Adams county, Kauffman, J., entered February 21, 1910, upon the verdict of a jury rendered in favor of the plaintiffs, in an action on contract. Affirmed.

Belden & Losey, for appellant.

Lovell & Davis, for respondents.

FULLERTON, J.—On May 21, 1908, the respondents ordered from the appellant certain machinery; namely, one steel separator, one steel wind stacker, one steel No. 8 Spokane feeder, one No. 6 bagger and spout, one separator brake, and one Oregon straw rack, agreeing to pay therefor the sum of $1,050, one-half on October 1, 1908, and one-half on October 1, 1910, with interest at eight per centum per annum from August 1, 1908. It was provided that the deferred payments should be evidenced by two promissory notes for $525 each, secured by a first mortgage on the machinery described. The order also provided that the purchasers

"Failing to . . . execute and deliver said notes and mortgage, properly filed or recorded, as a condition hereof, it is fully understood and agreed that the title to said goods shall not pass and this order shall at the company's option, stand as purchaser's written obligation and have the same force and effect as notes and mortgage for all sums not paid in cash, the whole amount of purchase money shall thereupon become then due and payable, and shall discharge the company from all warranty."

The order also contained the following warranties and conditions, namely:

"Said machinery is purchased upon and subject to the following mutual and interdependent conditions, and none other, namely:

"It is warranted to be made of good material, and durable with good care, to do as good work under same conditions as any made in the United States of equal size and rated capacity, if properly operated by competent persons with sufficient steam or horse power, and the printed rules and directions of the manufacturers intelligently followed. If by doing so, after trial of ten days by the purchasers, said machinery shall fail to fulfill the warranty, written notice thereof shall at once be given to J. I. Case Threshing Machine Company, at Racine, Wisconsin, and also to the agent through whom received, stating in what parts and wherein it fails to fulfill the warranty, and reasonable time shall be given to said company to send a competent person to remedy the difficulty, the purchaser rendering necessary and friendly assistance, said company reserving the right to replace any defective part or parts, and if then the machinery cannot be made to fulfill the warranty, the part that fails is to be returned by the purchaser, free of charge to the place where received, and the company notified thereof, and at the company's option another substituted therefor that shall fill the warranty, or the notes and money for such part immediately returned and the contract rescinded to that extent, and no further claim made on the company. Failure so to make such trial, or to give such notices in any respect, shall be conclusive evidence of due fulfillment of warranty on the part of said company and that the machinery is satisfactory to the purchasers, and the company shall be released from all liability under the warranty. Any assistance rendered by the company, its agents or servants in operating said machinery or in remedying any actual or alleged defects, either before or after the ten days' trial, shall in no case be deemed any waiver of, or excuse for, any failure of the purchaser to fully keep and perform the conditions of this warranty. When at the request of purchaser a man is sent to operate the above machinery, which is found to have been carelessly or improperly handled, said company, putting same in working order again, the expense incurred by J. I. Case Threshing Machine Company shall be paid by said purchaser. If any part of the machinery (excepting belting, which is not warranted) fails, from defect of material, while this warranty is in force, the company has the option to repair or replace the same, on presentation of the defective part or parts, but deficiency or

defect in any piece shall not condemn other parts, and the purchaser expressly waives all claim for damages on account of the nonfulfillment of said warranty by any of the above described machinery. Each machine and attachment is ordered at a separate fixed price, which price, unless otherwise specially agreed, bears the same ratio to the aggregate price above specified as the company's 1908 list price of each said machine and attachment bears to the aggregate list price of all said machines and attachments. This order is divisible as to each machine and attachment ordered, and the failure of any separate machine or attachment to fill the warranty shall not affect the liability of the purchaser for any other machine or attachment hereby ordered. Should any machine or attachment be subject to return under this order, it shall be returned at the separate fixed price at which it was sold as above provided, and second-hand machinery or other property taken in trade shall not be taken into account.

"It is further understood and expressly agreed that general agents, so called, have no general agency powers, and any breach of this warranty or any omission on the part of the company does not confer any right of damage for delay or loss of work or earnings, or to other damages, and shall not affect the rights of the parties with respect to any other machinery sold the purchasers or any warranty of such other machinery and no cause of action arising out of this contract or transaction shall be offset or counterclaimed against any liability of the purchaser arising out of any other contract or transaction. In no event shall the company be liable otherwise than for the return of cash and notes actually received by it.

"Failure to fully settle on delivery as above provided, or to comply with any of the conditions of this warranty on the purchaser's part, or any change in the printed terms of this warranty or the conditions thereof by any person whomsoever, agent or otherwise, by addition, erasure or waiver, or any abuse, misuse, unnecessary exposure of machinery, or waste committed or suffered by the purchasers, discharges the company from all liability whatever. No representation made by any person as an inducement to give and execute this order shall bind the company.

"The company assumes no liability for nonshipment, delay in shipment or transportation. Acceptance by purchasers is

a full waiver of any claim for delays in filling this order, arising from any cause. Attachments or devices specially ordered, and which are not made by this company, are not warranted. Any misrepresentation or concealment in making property statement, or any failure to secure notes as above provided, or to pay said notes when due, shall constitute a full release and waiver of all warranty.

"If crops in purchaser's vicinity are a failure and written notice is given to and received by the company at Racine, Wisconsin, before shipment, the delivery of the goods covered by this order may be deferred one year. In consideration of the expense incurred by the company in soliciting, investigating and taking this order, the purchaser promises and agrees to pay all freight charges on said machinery from the factory and 15% of the price above stipulated, in cash, in case he should cancel this order, or decline to accept said machinery. The purchaser hereby waives notice of the acceptance of this order by the company."

In due time after the receipt of the order, the machinery ordered was shipped to the purchasers, who received the same at the shipping point on the railway to which it was billed, paid the freight charges thereon in the sum of $165, and gave in payment of the machinery the promissory notes as provided in the contract. The machinery was taken to the home of one of the purchasers, where the separator was set up and run for a time in order to test the gearing and smooth the bearings. Sometime later, when the threshing season opened, they moved the machinery to the farm of a neighboring farmer whose grain they had contracted to thresh. On attempting to thresh the grain, however, it was discovered that the separator could not be made to work properly, as it would either waste the grain by blowing it over with the chaff and straw or fail to clean the heads properly. The respondents, after trying vainly for a couple of days to correct the defect, telegraphed the appellant at its office at Spokane, Washington, notifying it of the difficulty, and an expert was immediately sent to them to put the machine in order. What happened after the expert arrived is a matter of dispute in

the evidence. But since the jury have found in favor of the respondents, we are constrained to accept as true the version of the evidence which sustains their verdict.

Briefly stated, it appears from this evidence that the expert, after a day's trial in which he failed to correct the defect in the machine, called the appellant's general manager at Spokane, a Mr. Washburn, on the telephone and notified him of the fact; that the general manager appeared at the machine on the following day with another expert, and the three of them, assisted by still a third, employed in some manner and by some one not made clear in the record, after due trial failed in succeeding to make the machine thresh grain properly; that the general agent thereupon took the belts off the machine, rolled them up and placed them in the separator under cover, and on the respondents asking them at what railroad station he would have the machine delivered, told them to leave it where it then was. On the same or the next day the respondents requested the general agent to furnish them with a new separator, which request was refused. The respondents thereupon purchased a separator from another concern, and some two days later notified the appellant, by letter addressed to Racine, Wisconsin, that the machine purchased of it failed in the particular that it would not thresh grain and save it. To this letter the appellant responded by letter dated some five days later, acknowledging receipt of the respondents' letter, and stating, in substance, that all the company's matters in that territory were in the hands of Mr. Washburn, their general agent at Spokane, to whom this matter had been referred. Nothing further was done by either party until March 20, 1909, when the present action was begun on the warranty contained in the order to recover the purchase price of the machine, the freight charges paid, and damages and losses suffered by the respondents because of the inability to make the machine thresh in the manner warranted. In answer to the summons the appellant appeared specially and moved to quash the same on the ground

of insufficient service, and on its motion being overruled, appeared specially and answered, controverting the material allegations of the complaint, which special appearance it has maintained throughout the proceedings. The jury at the trial returned a verdict for the respondents for the sum of $1,359.75, and from the judgment entered thereon, this appeal is taken.

The motion to quash the summons was founded on affidavits tending to show that the appellant, at the time of the commencement of the action, had no office for the transaction of business in the county in which the action was brought, and that there was no person residing therein on whom process against it might be served. To these affidavits, however, counter-affidavits were filed tending to show, that the corporation upon which the service was made was engaged in the machinery business, having a store located in the county in which the action was brought; that it had a contract with the appellant in which it was recited that the appellant "doth hereby appoint said Chas. Labes & Company, Inc., agent at Lind, aforesaid, for the sale of its machinery, extras, supplies and repairs for the season of 1909;" and that quantities of the appellant's machinery was shipped to the corporation to be sold, which was exposed for sale and sold by the corporation.

The statute relating to the service of summons provides that, if the action be against a foreign corporation doing business within this state,the summons may be served on any agent thereof. We think there can be no question that the corporation on whom the summons was served was the agent of the appellant within the meaning of the code. It was not a person selling a particular brand of goods which it has purchased from the manufacturer, as the appellant seems to argue, but was on the contrary, selling the appellant's goods for the appellant, taking contracts in the name of the appellant, and accounting to it for the proceeds of the sale. This is an entirely different transaction than the one under consideration

in the case of *Mikolas v. Walker & Sons*, 73 Minn. 305, 76 N. W. 36. There, as the court said, the relation between the parties was the very familiar one "between manufacturers and wholesale dealers, by which the manufacturer agrees to sell his goods only to a certain wholesale dealer in a city, who in turn agrees to buy them exclusively from the manufacturer, and to sell them at prescribed prices fixed by the manufacturer" in consideration of certain rebates from the usual prices. But here there was no agreement to buy the appellant's goods on the part of the agent. It simply took them as the appellant's property and agreed to sell them for the appellant, as the appellant's property, at such prices and on such terms as the appellant should direct, and account to it for the proceeds of such sales. In the first case there was an outright purchase of the goods from the manufacturer by the dealer. After receiving the goods it could lawfully do what it pleased with them, rendering itself liable only to an action in damages for a breach of contract if it disposed of them in a manner contrary to its agreement. But in the case at bar, no such purchase was contemplated, and any interference with the appellant's ownership, outside of the strict terms of the agency contemplated by the agreement, would have been a subject of inquiry under the criminal statutes. Nor is the case of *McMaster v. Advance Thresher Machine Co.*, 10 Wash. 147, 38 Pac. 670, and the kindred cases following that decision, in point. In each of those cases the action was begun in a county where the defendant neither had an office for the transaction of business nor an agent on whom process against the company might be served. The motion to quash was properly denied.

On the merits of the controversy the appellant makes a number of contentions which will be noticed in their order.

The written order above set out, it will be observed, contains a recital to the effect that it "is further understood and expressly agreed that general agents, so-called, have no general agency powers." On the trial, after the respondents

had introduced evidence tending to prove that they had made such disposition of the property purchased, after they discovered that it could not be made to thresh, as the appellant's general agent directed, the appellant offered to prove that the agent had no power to authorize such a disposition of the machine, contending that the clause from the writing which we have quoted gave notice to them that the agent's powers were limited, and that he might not have authority to act in that behalf. The court rejected the evidence, and error is assigned thereon. We think the ruling correct. The clause in the writing quoted may have been a warning to the respondents that the agents procuring the order had no general agency powers, or powers to vary or add to the terms and conditions of the order, but it would be going far, indeed, to hold that it constituted notice that an agent sent by the company to deal with reference to conditions arising subsequent to the execution of the contract might not have the authority he actually exercised. Such a rule would lead to the grossest frauds. It would enable the principal to affirm those contracts made by the agent which redounded to his benefit, and repudiate all those that resulted in a loss.

The contract of purchase, it will be observed, provided that if the machine failed to comply with the warranty after a trial of ten days by the purchasers, notice thereof should be given the company at Racine, Wisconsin. The appellant contends that there was a breach of the condition, in that the respondents did not show that they gave the separator a ten days' trial. But while it is true that the evidence failed to show that the respondents endeavored to run the machine for ten full days, we think to require them to do so would be giving to the contract a too literal construction. It was the evident purpose of the parties, if they acted in good faith on entering into the contract, that the machine should be given a test sufficient to determine whether it would satisfactorily perform its functions, whether this should take more or less than the time fixed in the writing. Any other construction would lead

to absurd results. For example, it might be that the machine had a defect, capable of being corrected at the shops, which rendered it impossible to put it in motion. Would any one suppose that the purchaser must stay in a field for ten days and continually try to operate the machine before he could legally return it to the seller, after notifying him of the fact and receiving a refusal to correct the defect? This was not the meaning of the contract, and if the respondent gave it sufficient trial to demonstrate that it was incapable of threshing and saving grain—a question for the jury—they had the lawful right to return it to the seller, after notice of the fact to the seller and failure on the seller's part to put it in repair.

In this connection it is also argued that the notice sent to the appellant at Racine, Wisconsin, was not timely nor sufficient. It is objected that it was not timely because sent after the respondents had purchased a new machine. But we are unable to see how this fact could affect the timeliness of the notice. As we have stated, the appellant, in response to the notice, referred the respondents to Mr. Washburn, and then the matter seems to have been let drop. Mr. Washburn made no subsequent effort to put the machine in order, and certainly the respondents owed no duty to call upon him in the matter.

It is objected that the respondents did not give the appellant a reasonable time to correct the defects, and did not render them the friendly assistance required by the contract, but these objections raise in this case questions of fact for the jury, rather than questions of law for the court, and since the jury has determined them against the appellant, it must abide by the verdict.

It is next insisted that the respondents failed to specify in their notice to the appellant what part of the machinery proved to be defective, and for that reason the appellant lost its opportunity to supply the defective part. The notice stated the fact that the separator would not thresh and save the grain. This was sufficiently definite. It gave notice that

the fault lay with the separator. True, it did not specify what defect the separator had which caused it to fail to thresh, but the evidence shows that this could not be ascertained, either by the respondents themselves or the experts sent to correct the defect. Furthermore, it is said that the separator was distinct from the wind stacker, the feeder, the bagger and spout, the separator brake, and the Oregon straw rack, and although the separator may have failed to work, the respondents were obligated to keep and pay for these several articles, although the separator itself may have been defective, and since no fault was found with the manner in which they operated, their value should have been deducted from the recovery. But here, again, we think the appellant misconstrues the contract. These articles were but a part of the furnishings of the separator, so much a part, in fact, that they would be utterly useless without the separator, and although the language of the contract, literally construed, would seem to lend color to the appellant's contention, we cannot think such was its intent. The blank upon which the order was taken was evidently a standard form used by the appellant applicable to the sale of a number of distinct machines, which could well be said to be so far disconnected that the failure of one to comply with the warranty ought not to relieve the purchaser from liability as to the others. But the clause in the contract relied on is wholly inapplicable to a sale of a single machine and its furnishings, even though the furnishings be separately enumerated.

We have discussed the foregoing objections as if they were open to the appellant. We think, however, that when the appellant, in response to the respondents' telegram addressed to it at Spokane, sent their experts to put the machine in order, and those experts failed so to do, and after such failure, and after the respondents had made known to them their intention of surrendering the machine, gave direction as to its disposition, and refused to furnish the respondents with

another separator, it waived its right to insist that the respondents had not complied with the covenants of warranty.

The judgment is affirmed.

MOUNT, PARKER, and GOSE, JJ., concur.

[No. 9298. Department One. March 31, 1911.]

FELIX MARTIN, *Appellant*, v. J. A. BARGER *et al.*, *Respondents*.[1]

JUDGMENT—MATTERS DETERMINED—CONSTRUCTION OF WILL. An order in probate for crediting a $1,000 legacy upon a note due from the legatee, entered before the payment of claims or final distribution of the estate, is not an adjudication as to the legal effect of the credit, or a construction of the will, and does not determine the date of the credit for the purpose of computing interest.

JUDGMENT—MATTERS DETERMINED—ORDER FOR SALE IN PROBATE. An order in probate for the sale of a note belonging to the estate is not an adjudication of the obligation of the maker thereon.

JUDGMENT — MATTERS DETERMINED — FINAL DISTRIBUTION — CONSTRUCTION OF WILL. A final order of distribution of the estate in pursuance of a last will and testament and in accordance with the terms thereof is not a construction of the will.

WILLS—SPECIFIC LEGACY—CREDIT ON NOTE—INTEREST. A legacy of one thousand dollars, to be credited on a note due from the legatee, is a specific legacy to be credited as of the date of the death of the deceased.

Appeal from a judgment of the superior court for Whatcom county, Kellogg, J., entered July 25, 1910, in favor of the defendants upon the pleadings, in an action on a promissory note. Affirmed.

Hurlbut & Neal, for appellant.

John R. Crites, for respondents.

PARKER, J.—The plaintiff seeks to recover judgment against the defendants for a balance of $187.25, alleged to

[1]Reported in 114 Pac. 505.

be due upon a promissory note executed and delivered by them to Elizabeth Hart, deceased, during her lifetime. The defendants claim that the entire indebtedness evidenced by the note has been discharged by the terms of the will of Elizabeth Hart, the original payee. Judgment was entered in favor of the defendants on the pleadings, and the plaintiff has appealed.

The facts appearing by the pleadings may be briefly stated as follows: Elizabeth Hart died on September 13, 1903. Sometime prior to her death, the defendants became indebted to her in the sum of $1,300. This indebtedness was evidenced by the promissory note sued upon in this action. Interest was provided for therein at the rate of eight per cent per annum. Thereafter Elizabeth Hart made a will whereby she made a bequest to the respondent John A. Barger, her son, as follows:

"I give and bequeath to my son, John A. Barger, the sum of one thousand dollars, to be paid as follows: Said sum to be credited on a promissory note I now hold against him for the sum of thirteen hundred dollars, provided, however, that in case I survive my said son, then said sum of one thousand dollars is to be equally divided among my children hereinafter enumerated."

After her death this will was admitted to probate in the probate courts of Cedar county, Missouri, and Thayer county, Nebraska. In the course of the administration of the estate, on December 1, 1905, the probate court of Cedar county, Missouri, ordered the administrator to credit upon the note the $1,000 specified in the bequest to Barger in the will, which was then done accordingly. Prior thereto there had been paid upon the note certain sums which, together with the $1,000, would pay the entire amount of the indebtedness, if the credit of the $1,000 be considered as made upon the date of the death of Elizabeth Hart, September 13, 1903. It is only because of the accumulation of interest after that date that any sum would be due upon the note. After the

credit of $1,000 was so made upon the note, it was sold by the administrator in pursuance of an order of the probate court of Cedar county, Missouri, and appellant thereby became the holder thereof. It was not necessary to use any portion of the bequest made to Barger for the purpose of paying claims against the estate, bequests, or expenses of administration. The note matured long before appellant became the holder thereof. It is not claimed that he is an innocent holder so as to free the note from defenses the respondents may have thereto. Appellant alleges in his reply:

"Such proceedings were had in the matter of said estate in the probate court of said Cedar county, Missouri, that said promissory note was on the first day of December, 1905, duly credited in the sum of one thousand dollars in payment and satisfaction of the bequest made in said last will and testament of said Elizabeth Hart, deceased, and said promissory note was then, by order of said court, ordered to be sold, and was duly sold to plaintiff. . . .

"That thereafter such proceedings were had in each of said probate courts that the estate of said deceased within their respective jurisdictions was duly probated, all the debts against said deceased and the expenses of administration of said estate were duly paid, and the residue of the property of said Elizabeth Hart, deceased, was distributed in pursuance of said last will and testament and in accordance with the terms thereof. That the bequest of one thousand dollars made therein to the defendant Barger was duly paid and credited on the promissory note set out in plaintiff's first cause of action herein, on the first day of December, 1905, in the due and legal course of the administration of the estate of said deceased in said Cedar county, Missouri. . . ;

"That the order of said probate court of said Cedar county, Missouri, providing for the sale of said promissory note as alleged in plaintiff's complaint, and the final orders of distribution of said estate, or either of them, have not been made void or in any manner modified, or appealed from by defendant Barger, or at all, but the same and each of the same are in full force, effect and virtue. . . ."

It is contended by counsel for appellant: (1) that the orders of the probate court of Cedar county, Missouri, were

in effect a final adjudication that the respondent Barger is not entitled to receive credit upon the note for the $1,000 as of the date of the death of Elizabeth Hart; and (2) that in any event such bequest was a general bequest and payable as such in course of the administration of the estate, and that this would result in the interest upon the note continuing to run until the $1,000 was actually credited upon the note.

Was there such an adjudication by the probate court as renders the defense here invoked by respondents unavailing to them? Let us notice the real purport of the orders relied upon by appellant as constituting such adjudication, assuming that they are properly pleaded in the reply. The order for crediting the $1,000 upon the note was apparently not an order of distribution. The payment of claims and expenses of administration, and the final distribution of the estate, occurred after the order for the credit was made. There are no facts pleaded showing that respondent Barger accepted this credit as of the date it was actually made on the note, nor are there any facts pleaded showing that, by the terms of the order, it was assumed to thereby adjudicate the legal effect of the credit. We think that, so far as this order is concerned, its effect must be determined by the terms of the will, and that it did not amount to a construction of the will. Neither did the order for the sale of the note, after the credit of the $1,000 made thereon, amount to a construction of the will. An order made by a probate court for the sale of a note assumed to belong to an estate is far from an adjudication of the obligation of the maker thereon. The reply alleges that, after the payment of debts and expenses of administration, "*the residue of the property of said Elizabeth Hart, deceased, was distributed in pursuance of said last will and testament and in accordance with the terms thereof.*" There is no other allegation indicating the terms of the distribution, and it is only by inference that the pleadings indicate there was a distribution by order or decree. We will, therefore, assume that whatever order of distribution the court made, it distributed the estate in this

manner. This language is in effect the same as if the court had distributed the estate in the exact language of the will, and is therefore not a construction of the will at all, but leaves us to determine the nature of this bequest from the language of the will alone. We are of the opinion that, so far as the pleadings show, there has been no adjudication which prevents respondents from urging the defense here invoked by them.

What, then, is the nature of this bequest, and when did respondent Barger become vested with his property right therein. In 3 Pomeroy's Equity Jurisprudence (3d ed.), we find the following statement of general principles with reference to legacies, their nature and qualities:

"Sec. 1130. With regard to their intrinsic nature and qualities, legacies are of three kinds: specific, general, and demonstrative. A specific legacy is a bequest of a specific article of the testator's estate, distinguished from all others of the same kind; as, for example, a particular horse, or piece of plate, or money in a certain purse or chest, a particular stock in the public funds, a particular bond or other instrument for the payment of money. Whether a legacy is specific depends wholly upon the language of the will. . . . A specific legacy only becomes operative in case the very article given continues to form a part of the testator's estate at the time of his death. In such case the legatee acquires a title to the articles at the death, by virtue of the will, although the payment may be deferred, and must be obtained from the executor. Since his right of property is thus fixed, he is entitled to all income, profits, and proceeds arising or accruing on the article after the testator's death, and before its delivery or payment to himself."

"Sec. 1132. The terms 'general' legacies comprises all those which are not either specific or demonstrative—that is, those which are not gifts of some identical article or fund forming part of the testator's estate, nor gifts of a sum payable out of such an identified fund. They are, therefore, rather gifts of *amounts* than of things or pieces of property specially described and identified. . . . The peculiar effect of a general legacy is, that, instead of operating as a voluntary assignment of the identical thing to the legatee, and so taking effect only when the specific thing or fund remains in

existence as a part of the testator's estate, it creates an obligation resting upon the executor to pay to the legatee the amount specified, if there are sufficient assets left in the estate."

"Sec. 1133. Demonstrative legacies are a peculiar kind which partake of the nature of both specific and general legacies, and combine the advantages of each. Demonstrative legacies are bequests of sums of money, or of quantity or amounts having a pecuniary value and measure, not in themselves specific, but made payable *primarily* out of a particular designated fund or piece of property belonging, or assumed to belong, to the testator. Their effect is peculiar. Although made primarily payable out of a particular fund, these legacies do not fail—are not adeemed—because such fund may not exist as a part of the testator's estate at his death, but they are then payable out of his general assets, like general legacies. On the other hand, if such particular fund is in existence as a part of the testator's estate at his death, they are not liable to abatement in common with general legacies, but are entitled to payment under the circumstances in exactly the same manner as true specific legacies."

See, also, notes in 11 Am. Dec. 468 (*Walton v. Walton*, 7 Johns. Ch. 258), and 11 L. R. A. (N. S.) 55 (*In re Snyder*, 217 Pa. 71, 66 Atl. 157, 118 Am. St. 900); 2 Woerner, American Law of Administration (2d ed.), § 444.

It seems to us that under these rules this must be regarded as a specific legacy. It consists of a gift of a specific thing; that is a specific credit upon a debt due from the legatee to the testator. The thing given can be identified and distinguished from other property of the testator. It did not involve the payment of a sum of money to Barger, either from the estate in general or from any particular funds or property of the estate. This view finds support in, *Sholl v. Sholl*, 5 Barb. 312; and *Wheeler v. Wood*, 104 Mich. 414, 62 N. W. 577. In both of these cases the legacies were held to be specific, notwithstanding they were in terms gifts of the amount or sum of certain indebtedness due from the legatees to the donors, like in this case, rather than gifts of the instruments evidencing such indebtedness.

In *Davis v. Crandall*, 101 N. Y. 311, 4 N. E. 721, and *Smith's Appeal*, 103 Pa. St. 559, we have instances of gifts of certain sums from certain specific funds owing to the testator from third parties, which gifts were held to be specific legacies. Since we conclude that this is a specific legacy, Barger's right of property therein became fixed at the time of the death of Elizabeth Hart, and the estate could not thereafter profit by interest upon the note. So far as his rights are concerned, his obligation to the estate was reduced by the amount of the bequest, as if the $1,000 had then been credited upon the note. His property right in the credit was, of course, subject to the rights of creditors of the estate and expenses of administration; this, however, was only a possible charge upon his debt obligation to the deceased, which was found not to exist in fact, in the course of administration. *Loring v. Woodward*, 41 N. H. 391; *Smith v. McKitterick*, 51 Iowa 548, 2 N. W. 390; *Proctor v. Robinson*, 35 Mich. 284; 3 Pomeroy, Equity Jurisprudence (3d ed.), § 1130.

The judgment is affirmed.

DUNBAR, C. J., MOUNT, GOSE, and FULLERTON, JJ., concur.

[No. 9176. Department One. April 1, 1911.]

EDWARD D. KOHL *et al.*, *Respondents*, v. MASTIN TAYLOR, *Appellant*.[1]

CORPORATIONS—STOCK—SALES—RESCISSION BY VENDEE—FRAUD. The false statement of the owner of corporate stock as to what it had actually cost him, for the purpose of inducing a sale, is a misrepresentation of a material fact, for which rescission and damages may be had, especially, where future business relations were to grow out of the sale.

Appeal from a judgment of the superior court for Jefferson county, Still, J., entered March 22, 1910, in favor of

[1]Reported in 114 Pac. 874.

the plaintiffs, after a trial before the court without a jury, in an action to cancel and set aside a note and mortgage. Affirmed.

W. H. Abel, for appellant.

Bridges & Bruener, for respondents.

PARKER, J.—The plaintiffs commenced this action to procure a decree cancelling a certain note, and mortgage securing payment thereof, executed and delivered by them to the defendant on July 23, 1909, for $3,500, or in the alternative, a judgment against the defendant for damages in the event the note is transferred to an innocent holder so that its cancellation cannot be had. Such relief is sought by the plaintiffs upon the ground of alleged fraudulent and false representations made by the defendant to the plaintiffs inducing them to execute the note and mortgage. Judgment was rendered against the defendant and in favor of the plaintiffs for $3,500 damages. The defendant has appealed.

Early in the summer of 1909, agents of the Chicago Cabinet Company visited the Grays Harbor country for the purpose of selling territorial rights for the sale of the Success Kitchen Cabinet. About July 1st of that year, appellant and three other residents of Hoquiam associated themselves together, each contributing the sum of $3,500 towards a fund of $14,000, for the purpose of purchasing territorial rights for the sale of the Success Kitchen Cabinet, and engaging in the business of the sale thereof. To that end they organized a corporation by the name of The California Cabinet Company, with a stated capital stock of $50,000, divided into 500 shares of the par value of $100 each. The appellant and his associates were each to become the owner of one-fourth of the stock. They purchased the right to sell Success Kitchen Cabinets in the state of California for the sum of $12,000. This right, and the $2,000 remaining of the $14,000, became the property of the California Cab-

inet Company, and its only resources. It was understood that the several stock subscriptions of appellant and his associates were to be considered as paid for in full by this transaction. Thus appellant became the owner of 125 shares of the stock of the par value of $12,500, at a cost of $3,500. A few days thereafter appellant induced the respondents to purchase from him one-half of his stock, being 62½ shares, for $3,500. In payment thereof respondents executed and delivered to appellant their negotiable promissory note for $3,500, and a mortgage upon land owned by them in Jefferson county to secure the same. A few days thereafter appellant transferred the note to an innocent holder for value before maturity, which transfer prevented its cancellation. This accounts for the form of judgment rendered by the trial court.

The representation made by the appellant to the respondents inducing them to purchase the stock and give him the note and mortgage in payment thereof is the principal fact determining this controversy. The facts are not established by evidence which is free from conflict, but we think the evidence was such as to warrant the court in believing the following: While both respondents executed the note and mortgage, the negotiations for the sale of the stock were made by appellant principally with Mrs. Kohl. Her husband is in ill health and she seems to be the business manager for the family. She and appellant had been acquainted for about six years, and on friendly terms during that period. She and her husband were running a hotel at Aberdeen on July 3, 1909. During the afternoon of that day appellant called on Mrs. Kohl and submitted to her the proposition of selling her one-half of his stock in the California Cabinet Company for $3,500. He then explained to her the purpose of the organization of the company, and represented to her its prospective profits in such manner as to induce her to believe that they would be very large. He also represented to her that if she would become a stockholder in the corporation he would

procure employment for her by the company at a salary of $100 per month. It appears that the by-laws of the company provided that all of the original stockholders should be employed by the company at a salary of $100 per month, and that each of such stockholders could employ a competent person to take his place. Appellant told her that he had more stock than he could handle and wanted her to take part of it off his hands and represent him in the corporation. She would not then decide the matter, but told him she would talk to Mr. Kohl when he came home towards evening, Mr. Kohl then being absent from the hotel. Appellant finally asked her to call him up by 'phone in the evening and let him know if she would take the stock. This she did not do, but he called her up and again urged her to take the stock. This conversation over the 'phone resulted in his coming to the hotel later that evening and talking to both Mr. and Mrs. Kohl. Mr. Kohl testified that at this conversation appellant said: "That he would let us have it (stock) for actually the same as he had got it for, what it cost him, he said that he would not be making a cent." Mrs. Kohl testified that appellant said, among other things, at this conversation, "That he was not making one cent on it. That he was just letting me in so that I could manage his part of it."

We think the trial court was warranted in believing that appellant made statements relative to the cost of the stock to him in substance as respondents testified, although he himself denies making such statements. The deal was then completed by respondents executing the note and mortgage, when appellant gave to them a written memorandum which he signed, agreeing to have issued to them the 62½ shares of stock. The stock was not then formally issued by the company, it being claimed that the delay was caused by the fact that the corporation had not yet procured a seal. It is clear that this representation made by appellant, as to letting respondents have the stock at the same price it had cost him, was false, and also that it was one of the prin-

cipal inducements leading them to purchase the stock and execute the note and mortgage in payment thereof. Before any certificate for the 62½ shares of stock had actually been issued and tendered to respondents, they repudiated the purchase thereof, upon the ground that they were induced by the false representations of appellant to purchase the same, and thereafter refused to accept the stock. During all this time appellant was the president of the corporation.

Learned counsel for appellant contends that any false statements made by appellant to respondents as to the cost of the stock to him, as an inducement to them to purchase it at the price offered, would not form a legal basis for the relief sought by the respondents. It may be conceded that there are authorities supporting this contention, where the parties are dealing at arm's length and there is nothing involved but a mere sale of property, with no thought of future business relations between the parties in connection with the property which may be the subject of sale; though even in such cases there is eminent authority to the contrary.

In the case of *Fairchild v. McMahon*, 139 N. Y. 290, 34 N. E. 779, 36 Am. St. 701, the court of appeals had under consideration a false statement made by the owner of real property as to the amount it had recently cost him, to the owner of other property, for the purpose of inducing an exchange of the properties, which statement did induce the exchange. Such statement was there held to be a statement of a material fact, and a sufficient basis upon which to predicate a finding of fraud. At page 294, quoting with approval from *Sandford v. Handy*, 23 Wend. 260, the court said, relative to such a statement, "It is a material fact, which not only tends to enhance the value, but gives to it a firmness and effect beyond the force of mere opinion." *Thompson v. Koewing* (N. J.), 76 Atl. 752; *Mason v. Thornton*, 74 Ark. 46, 84 S. W. 1048; *Grinnell v. Hill*, 1 Cal. App. 492, 82 Pac. 445; *Kimber v. Young*, 137 Fed. 744; *Hughes v. Lockington*, 221 Ill. 571, 77 N. E. 1105. In this case the

contemplated future business relations of the parties to grow out of the stock sale seem to furnish additional reasons in support of respondents' contentions. *Teachout v. Van Hoesen*, 76 Iowa 113, 40 N. W. 96, 14 Am. St. 206; *Johnson v. Gavitt*, 114 Iowa 183, 86 N. W. 256; *Kilgore v. Bruce*, 166 Mass. 136, 44 N. E. 108; *Strickland v. Graybill*, 97 Va. 602, 34 S. E. 475. We are constrained to adopt the holding of these authorities. It seems clear to us that a false statement of the price the vendor paid for property a short time before he sells it to his vendee, under such circumstances as are disclosed by this record, is a false statement of a material existing fact, and is sufficient to support the contentions of the respondents made in this case.

There were other alleged false representations made by appellant to respondents which, when critically examined, would probably lend additional support to respondents' contentions in this case, but we do not find it necessary to analyze them, since we are of the opinion that those we have noticed are sufficient to support the judgment of the trial court. We are of the opinion that that judgment should be affirmed. It is so ordered.

DUNBAR, C. J., MOUNT, FULLERTON, and GOSE, JJ., concur.

[No. 9165. Department One. April 4, 1911.]

GEORGE C. RICHARDS, *Appellant*, v. THE CITY OF SEATTLE, *Respondent*.[1]

MUNICIPAL CORPORATIONS—NUISANCES—ABATEMENT—DAMAGES—THREATENED ACTION, Damages cannot be recovered from a city by one who was coerced to cease the operation of charcoal kilns by notices from the health department to abate the alleged nuisance or the kilns would be destroyed; since he was under no obligation to cease operations unless his acts were a nuisance.

NUISANCE—CHARCOAL KILNS—EVIDENCE. A *prima facie* case of a nuisance is made out by evidence that charcoal kilns within the city gave out quantities of smoke and at times poisonous gases.

NUISANCE—ABATEMENT—DEFENSES. The abatement of a nuisance cannot be prevented by reason of the fact that there were similar nuisances in the vicinity.

Appeal from a judgment of the superior court for King county, Tallman, J., entered April 15, 1910, upon granting a nonsuit, dismissing an action for damages. Affirmed.

Faben & Kelleran, for appellant.

Scott Calhoun and *H. D. Hughes*, for respondent.

MOUNT, J.—The plaintiff brought this action against the defendant to recover damages, for the alleged reason that the defendant, through its health department, coerced and compelled the plaintiff to desist from operating certain charcoal kilns within the corporate limits of the city. On the trial of the case, it appeared that the plaintiff had, for more than a year prior to July 3, 1908, operated two charcoal kilns at a point near Ballard in said city. Complaints concerning the smoke therefrom were made by citizens to the health department. This department, after an investigation, notified the plaintiff that he must cease operating the kilns unless he installed condensers or retorts therein within

[1]Reported in 114 Pac. 896.

three days after July 3, 1908. A notice was then posted upon the kilns as follows:

"DEPARTMENT OF HEALTH AND SANITATION,
"CITY OF SEATTLE.

"To whom it may concern: It is hereby ordered by the commission of health, acting under authority of the charter and ordinances of the city of Seattle, that all persons occupying the within premises shall vacate the same on or before the — day of ————, 19—. Immediately after said date, or at such time as may be fixed by the commissioner of health, this building, unless put in sanitary condition, will be destroyed or removed from the premises, for the reason that it is unsanitary and unfit for human habitation. Any person attempting to occupy this building on or after the above mentioned date will do so at his or her peril. Any person who shall remove or deface this notice will be arrested and punished according to law.

"Dated at Seattle, Washington, this — day of ————, 19——.

"By ————, Sanitary Inspector,
"J. E. Crichton, M. D.,
"Commissioner of Health."

The plaintiff thereupon ceased to use the kilns, and afterwards brought this action for damages. At the close of the plaintiff's evidence, the trial court granted defendant's motion for nonsuit and dismissed the action. The plaintiff has appealed.

It was not shown nor claimed, as we read the record, that the kilns were destroyed, or that the city officers did anything more than notify the plaintiff that the kiln burners were unsanitary, and that unless they were put in a sanitary condition they would be destroyed. The plaintiff thereupon ceased to use the burners. There can be no doubt of the right of the city to declare a nuisance and to abate the same. Rem. & Bal. Code, § 7507, subds. 22, 30, and 31. The action of the officers of the health department, in notifying the plaintiff and posting the notice upon the kilns in question, was no doubt intended as a step toward abating what the officers declared to be a nuisance. If the kilns were not

offensive and were not a nuisance, the notices were of no effect. The plaintiff was under no obligation to cease operating the kilns, because the right of the city or its officers to destroy the kilns depended on the fact whether they were offensive to the senses or deleterious to the public health. If the kilns were not such, then the city would have no right to interfere, and the plaintiff might stand upon his right and proceed with the use of the property without liability. On the other hand, if the kilns were in fact a nuisance, then there would be no liability against the city in abating them. The evidence on the part of the plaintiff plainly shows that the kilns were located within the city and gave off quantities of smoke and at times poisonous gases. This of itself made a *prima facie* case in favor of the city. The fact that there were other nuisances or mills located in the same vicinity, which gave off the same gases and more smoke, did not prevent the city from proceeding to abate this particular nuisance.

The judgment is therefore affirmed.

DUNBAR, C. J., PARKER, and GOSE, JJ., concur.

[No. 8913. Department Two. April 5, 1911.]

THE STATE OF WASHINGTON, *Appellant*, v. MASAJI NAKASHIMA, *Respondent*.[1]

MARRIAGE—RESTRICTIONS—STATUTES—REPEAL. Rem. & Bal. Code, § 7151, prohibiting marriage between persons nearer of kin than second cousins, was not impliedly repealed by Rem. & Bal. Code, § 2455, defining incest, or by Rem. & Bal. Code, §§ 7152, 7153, 7164, 7165, relating to and prohibiting marriages in certain other specified cases.

INCEST—INFORMATION—NEGATIVING DEFENSES—MARRIAGE. Upon a prosecution for incest between first cousins, the fact of a lawful marriage between the parties, if a defense, is to be affirmatively pleaded, and need not be negatived in an information stating every essential element of the crime as defined by Rem. & Bal. Code, § 2455.

[1]Reported in 114 Pac. 894.

Appeal from a judgment of the superior court for King county, Ronald, J., entered February 11, 1910, upon sustaining an objection to the introduction of evidence, dismissing a prosecution for incest. Reversed.

George F. Vanderveer and *J. L. Finch*, for appellant.

Burkey, O'Brien & Burkey, for respondent.

Crow, J.—This is an appeal by the state of Washington from a judgment sustaining an objection to the introduction of evidence, and dismissing a criminal action.

The controlling question is the sufficiency of the information, the charging portion of which reads as follows:

"He, the said Masaji Nakashima, a male person, and she, said Tama Kawamura, a female person, in the county of King, state of Washington, on the 20th day of November, 1909, being then and there first cousins computing by the rules of the civil law, did then and there wilfully, unlawfully and feloniously have sexual intercourse together."

The state elected to first try the respondent Masaji Nakashima who, after the jury had been impaneled, objected to the introduction of any evidence, contending that the information did not charge any crime, it having failed to negative a marriage between the defendants. Rem. & Bal. Code, § 2455, reads as follows:

"Whenever any male and female persons, nearer of kin to each other than second cousins, computing by the rules of the civil law, whether of the half or the whole blood, shall have sexual intercourse together, both shall be guilty of incest and punished by imprisonment in the state penitentiary for not more than ten years."

Marriages in this state are prohibited between parties nearer of kin to each other than second cousins, either of the whole or half blood, computing by the rules of the civil law. Rem. & Bal. Code, § 7151. This court, in *Johnson v. Johnson*, 57 Wash. 89, 106 Pac. 500, held void a marriage between first cousins domiciled in this state, who for the

purpose of avoiding the law of this state had visited a foreign jurisdiction where first cousins could lawfully marry, had there contracted the relation, and had immediately returned to this state to live as husband and wife. Mr. Bishop defines incest as follows:

"Incest, where statutes have not modified its meaning, is sexual commerce, either habitual or in a single instance, and either under a form of marriage or without it, between two persons too nearly related in consanguinity or affinity to be entitled to intermarry." Bishop, Stat. Crimes (3d ed.), § 727.

See, also, 22 Cyc. 43.

Our statute, § 2455, *supra*, in defining incest, makes no distinction between persons who claim to have been lawfully married, or to have gone through the form of a marriage ceremony, and those who are unmarried. It is suggested in respondent's brief that § 7151, Rem. & Bal. Code, *supra*, prohibiting first cousins from marrying in this state, has by implication been repealed and superseded by § 2455, *supra*, the same being § 203 of the criminal code of 1909 (Laws 1909, p. 950), defining incest; and by chapter 16, Laws of 1909, page 53, Extraordinary Session (Rem. & Bal. Code, §§7152, 7153, 7164, 7165), relating to and prohibiting marriages in certain cases. This contention is without merit. There is nothing in the act last above mentioned indicating any intention of the legislature to legalize marriages between parties nearer of kin than second cousins. Respondent's counsel in their brief thus state their contention:

"We will simply state that the position of the trial court was, and that of respondent is, that, viewing as a whole the law applicable to the situation, the legislature did not intend to make criminal, intercourse between persons who, at the time, are legal husband and wife and recognized as such by the laws of this state, and hence, such persons, living in the married relation, are guilty of no offense, even if first cousins, and that to charge one with incest in the language of the particular statute is insufficient without stating therein also the facts showing the accused to belong to the class

against which the statute is directed, viz., persons not lawful husband and wife. It is respondent's contention that the statute in question should be construed as containing an exception in favor of persons who are lawful husband and wife, and, so construing it, the exception should be negatived in the information."

Respondent calls attention to the fact that, in many foreign jurisdictions, including some of the American states, legal marriages may be contracted between first cousins, then domiciled in such jurisdictions; and contends that if thereafter they should become citizens of this state, they would be entitled, under the laws of comity, to be here regarded as legally married.

In *State v. Fenn*, 47 Wash. 561, 92 Pac. 417, 17 L. R. A. (N. S.) 800, we said:

"In support of its appeal the state relies upon the two general propositions that a marriage, valid where contracted, is valid everywhere, and that statutes declaring a second marriage unlawful, pending the time for appeal from divorce proceedings and imposing a penalty for their violation, are penal in their nature and have no extraterritorial effect. The general doctrine that a marriage valid where contracted is valid everywhere, has so often been declared by the courts and reiterated by text writers that it has become a maxim of the law. But there are exceptions to the rule as well established as the rule itself, viz: (1) incestuous and polygamous marriages prohibited by natural law; and (2) marriages prohibited by positive law."

Relative to the first exception, the question arises, what would be an incestuous marriage prohibited by natural law. Respondent, citing 1 Bishop, Marriage & Divorce (5th ed.), § 377, and *Pennegar v. State*, 87 Tenn. 244, 10 S. W. 305, 10 Am. St. 648, 2 L. R. A. 703, contends that incestuous marriages prohibited by the natural law are confined to marriages between parties related in a direct lineal line of consanguinity, and in the collateral line between brothers and sisters. He argues that marriages between first cousins are not incestuous under any prohibition of natural law; that

they do not come within the exception mentioned, and that such marriages, if contracted where lawful, between citizens within their own domicile, would be valid everywhere. Even though marriages contracted between first cousins where valid should be held valid everywhere, it is nevertheless apparent that there might be other marriages, contracted in foreign jurisdictions between persons of much nearer degree of kindred, so incestuous as to be prohibited by the natural law, which under the authority of *Johnson v. Johnson*, *supra*, would certainly render them void in this jurisdiction. On a charge of incest here preferred against such persons, it would be absurd to hold that an information which alleged their consanguinity, but failed to negative their marriage, would be insufficient. Yet any allegation necessary to charge cousins with incest would likewise be necessary to charge other defendants much more closely related. The same rule of pleading should prevail in each case, as our statute in defining incest makes no distinction between first cousins and other offenders. Assuming that first cousins, citizens of, or domiciled in, another jurisdiction, who legally marry there, could afterwards continue their relations in this state and not be guilty of incest, we think the fact of their marriage, if material at all, should be here relied upon and pleaded as an affirmative defense to an information charging incest, and that no allegation would have to be incorporated in the information to negative marriage. Respondent cites and relies upon the following rule of criminal pleading announced in 10 Ency. Plead. & Prac., at page 336:

"When there is a possibility that a lawful marriage may have been contracted between the parties—as in the case of first cousins, who are prohibited from marrying in some states but not in others, or where a relationship not formerly included within the prohibited degrees of consanguinity has been added by statute—an indictment against them should allege that they are not lawfully man and wife."

It will be observed from the foot note that *State v. Fritts*, 48 Ark. 66, 2 S. W. 256, is cited in support of the text, and

that reference is also made to *State v. Brown*, 47 Ohio St. 102, 23 N. E. 747, 21 Am. St. 790, which announces the contrary rule. After a careful examination of each of these cases, we feel constrained to approve and adopt the reasoning of the Ohio case. There the defendant was charged with incest. The indictment, however, failed to allege that the parties concerned were not husband and wife. A motion to quash by reason of such omission was interposed and overruled. The court, in passing upon the sufficiency of the pleading, said:

"By referring to the statute, section 7019, it will be observed that it contains no exception in favor of parties who are intermarried; the language is general, and comprehends them as well as the unmarried. Upon what principle, then, can an exception be engrafted in this section by judicial construction? We know of none. By the law of England the intermarriage of the parties did not render the connection any less incestuous. *Blackmore v. Brider*, 2 Phillimore 359; *Woods v. Woods*, 2 Curt. Ecc. 516. Bishop defines it as follows: 'Incest, where statutes have not modified its meaning, is sexual commerce, either habitual or in a single instance, and either under a form of marriage or without it, between persons too nearly related in consanguinity or affinity to be entitled to intermarry.' Bish. St. Cr. § 727. The act is little, if any, less repulsive to a correct sense of decency, and no less a violation of sound public policy, because it is perpetrated by persons living together publicly under the form of marriage, than if done by them clandestinely, and occasionally only. We hold, therefore, that by § 7019, Rev. Stats., sexual commerce, as between persons nearer of kin than cousins, is prohibited, whether they have gone through the form of intermarriage or not; nor is it material that the marriage was celebrated in a country where it was valid, for we are not bound, upon principles of comity, to permit persons to violate our criminal laws, adopted in the interest of decency and good morals, and based on principles of sound public policy, because they have assumed, in another state or country where it was lawful, the relation which led to the acts prohibited by our laws."

Our statute defining incest is simple, clear, and concise.

The information charging the respondent was drawn in exact compliance with its terms, and stated every essential element of the crime. If there in fact existed between the defendants a marriage relation contracted in a foreign jurisdiction, which would have to be regarded as legal here and which would relieve them from the crime charged, such marriage relation should be pleaded and proven by them as a defense, and need not be negatived by the information.

The judgment is reversed.

Dunbar, C. J., Chadwick, and Morris, JJ., concur.

[No. 9359. *En Banc.* April 5, 1911.]

The State of Washington, *Respondent*, v. Dennis Sargent, *Appellant*.[1]

Rape—Statutory Rape—Defenses—Previous Chaste Character. Under an information charging rape on or about March 1st, by carnally knowing a female child between 15 and 18 years of age, of previous chaste character, where the prosecutor elected an act of January 20th, the defense that the prosecutrix was not then of chaste character, by reason of previous relations with the accused, is not available, where all their acts occurred in the same county, within one month; since any one of the acts would have sustained a conviction under the information.

Appeal from a judgment of the superior court for Thurston county, Mitchell, J., entered June 29, 1909, upon a trial and conviction of rape. Affirmed.

G. C. Israel and *Frank C. Owings*, for appellant.

John M. Wilson, for respondent.

Crow, J.—This is an appeal from a judgment of the superior court of Thurston county, entered upon a verdict convicting the defendant of statutory rape.

[1]Reported in 114 Pac. 868.

Section 2436, Rem. & Bal. Code, in so far as it applies to this cause, reads as follows:

"Every person who shall carnally know and abuse any female child under the age of eighteen years, not his wife, shall be punished as follows: . . .

"(3) When such child is fifteen and under eighteen years of age, and of previously chaste character, by imprisonment in the state penitentiary for not more than ten years, or by imprisonment in the county jail for not more than one year."

Appellant, Dennis Sargent, was charged under subd. 3. The female child, as prosecuting witness, testified that the first act of intercourse occurred on January 2, 1910, and that subsequent acts prior to March 1, 1910, the date named in the information, occurred on January 16, January 18, and January 20, 1910. Appellant was arrested on March 15, 1910. The evidence was sufficient to show, and the jury by their verdict found, the prosecuting witness to be of previously chaste character. The state, upon appellant's motion and the order of the trial court, selected the act of January 20, 1910, as the particular one upon which it relied for conviction.

Appellant contends that the trial judge erred in denying his motion to withdraw the cause from the jury, and in not directing a verdict of acquittal. Citing *State v. Dacke*, 59 Wash. 238, 109 Pac. 1050, appellant insists that the evidence of the prosecuting witness shows she was not of chaste character on January 20, 1910, the date of the act upon which the state relied, and that the appellant should have been discharged, his theory being that the prosecuting witness was unchaste at all times after her first intercourse with him on January 2, 1910. There is a marked distinction between the facts of the *Dacke* case and those here shown. Dacke, who was informed against and convicted in Kittitas county, had previously sustained criminal relations with the prosecuting witness in Snohomish county, at various times from November, 1908, until March, 1909. The prose-

cuting witness then moved to Kittitas county where the criminal act charged, and for which the defendant was convicted, subsequently occurred. The statute under which he was prosecuted, being the section here involved, did not go into effect until June 8, 1909, at which time the prosecuting witness was unchaste. Discussing the statute, we said:

"The requirement that the female against whom the offense is committed shall be of 'previously chaste character' was unknown to the common law, nor was it an ingredient of any statute of this state defining rape, until the act of 1909. When, therefore, that act went into effect on the 8th day of June, 1909, it brought within its protecting terms a theretofore—so far as this crime is concerned—unknown requirement, that of previous chastity. The carnal knowledge of a female child between the ages of fifteen and eighteen years with her consent, under the old law, constituted rape; but under this act of 1909, under which this information lies, such carnal knowledge is not a crime unless the female child be of 'previously chaste character'."

None of the criminal acts occurring between Dacke and the prosecuting witness from November, 1908, to March, 1909, could have been proven under the information drawn under the third subdivision of § 2436. The act pleaded and relied upon for conviction occurred in Kittitas county, where Dacke and the prosecuting witness had resumed their criminal relations about June 30, 1909, and this court held the prosecuting witness was then unchaste, although she had sustained no criminal relation with any man other than Dacke, but she was unchaste prior to the enactment of the law under which he was prosecuted. We are not inclined to extend the doctrine there announced by applying the same to the facts of this case. Here evidence of any one of the criminal acts from January 2 to January 20, to which the prosecuting witness testified, was admissible under the authority of *State v. Osborne*, 39 Wash. 548, 81 Pac. 1096, to support the information, although it charged the act had been committed on or about March 1, 1910, and although

the appellant was entitled to an order requiring the state to announce the particular act on which it relied. The prosecuting witness was of previously chaste character on January 2, 1910, the date of the first act to which she testified. If appellant's contention is to be sustained, to the effect that he cannot be convicted for any subsequent act committed within the same calendar month, it would then be impossible to convict any defendant of the commission of this crime, upon the person of a female child over fifteen and less than eighteen years of age, unless the state relied upon the first act only and was able to produce other evidence to corroborate the testimony of the prosecuting witness as to that particular act. Such a holding would practically remove that protection with which the statute seeks to clothe female children of chaste character between fifteen and eighteen years of age. We are not prepared to thus extend the doctrine of the *Dacke* case, and in effect annul the statute itself.

In *Bailey v. State*, 57 Neb. 706, 78 N. W. 284, 73 Am. St. 540, cited and commented upon in the *Dacke* case, the defendant was indicted for having intercourse with one Clara Blue, on June 13, 1898, she then being a female child of the age of sixteen and not previously unchaste. No other man ever had intercourse with her. In the preceding March, while she was living in Iowa, the defendant had intercourse with her there. Subsequently she came to the state of Nebraska, where the defendant had intercourse with her on the 13th day of June. The court held that, to convict under the statute, the evidence must show beyond a reasonable doubt that she was of previously chaste character; but further stated that, if the first criminal act had occurred in Nebraska instead of Iowa, on the same date on which it did occur in Iowa, although it was prior to the particular act charged in the indictment, it would not have constituted a defense to an indictment predicated on the later act, since both acts had they occurred in Nebraska would have been within the

statute of limitations, and each would have constituted a part of the crime charged. The court said:

"The fact that she was first deprived of her virginity by the prisoner does not strengthen the state's case. That first illicit sexual act of the female and prisoner occurred in the state of Iowa. Had the first defilement of the girl by the prisoner occurred in Nebraska instead of Iowa on the date it did, and which was prior to the one charged in the indictment, then the first defilement would be no defense to the prisoner on an indictment for the second, since both would have been within the statute of limitations and each intercourse a part of the crime charged in the indictment. But to sustain this conviction on this evidence is to punish the prisoner here for the crime committed in another jurisdiction."

Here but three acts, all occurring in Thurston county, were shown to have preceded the one selected by the prosecution, all of them, including the first, and the one upon which appellant was convicted, occurred within the brief period of less than one month. Upon this record we think it would be a travesty on justice to disturb the verdict of conviction.

The judgment is affirmed.

Dunbar, C. J., Parker, Mount, Fullerton, Morris, and Gose, JJ., concur.

[No. 9121. Department Two. January 31, 1911.]

A. Z. SMITH, *Respondent*, v. I. DAVIS, *Appellant*.[1]

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered June 24, 1910, upon findings in favor of the plaintiff, in an action for the dissolution of a partnership. Affirmed.

Stallcup & Keyes, for appellant.
Stevenson & Sorley, for respondent.

PER CURIAM.—This was an action for the dissolution of a copartnership, the appointment of a receiver, and for an accounting between partners. From a judgment in favor of the plaintiff according to the prayer of the complaint, the defendant has appealed.

The court below found that a copartnership existed as alleged, together with the terms of the copartnership agreement, and also found ample grounds for the dissolution of the copartnership and the appointment of a receiver. The case presents questions of fact only, and a review of the testimony would be profitless to the parties, the profession, or the public. We therefore deem it sufficient to say that the findings are supported by ample testimony, and the judgment is accordingly affirmed.

[No. 9030. Department Two. March 13, 1911.]

ANNIE COWING-CALDWELL, *Respondent*, v. RUDOLPH WENZEL *et al.*, *Appellants*.[2]

Appeal from a judgment of the superior court for Yakima county, Preble, J., entered April 27, 1910, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to quiet title. Affirmed.

Parker & Richards, for appellants.
McAulay & Meigs, for respondent.

PER CURIAM.—This is an action to remove a cloud from the title to a certain tract of land in Yakima county, Washington. The plaintiff in brief alleges that she was the owner in her own separate right of said land, and that on the 21st day of September, 1909, one Ed. Parker, assuming and pretending to act as her agent, entered into

[1]Reported in 112 Pac. 1135.

[2]Reported in 113 Pac. 1135.

a contract with the defendant and appellant Rudolph Wenzel. The contract is an ordinary contract for the sale of real estate, and is an agreement on the part of the respondent to sell to Rudolph Wenzel, on certain conditions, as stated in the contract, which is made a part of the complaint. The contract is signed, "Annie Cowing-Caldwell [respondent herein] by Ed. Parker, her agent," and signed by Rudolph Wenzel, appellant herein. The complaint alleges that the respondent never signed said contract nor authorized Parker to sign the same; that she refused to accept or ratify said contract; that said contract was recorded by defendants, and that by virtue thereof the defendants claim some right, title, and interest in said land above mentioned. The prayer of the complaint is to have respondent's title established as against the claim of the appellants, and that they be barred from claiming any right or title to the premises, and for an order to release said contract of record.

The answer admitted that the respondent held the legal title to said property in her own separate right, but denied that she was the owner and in possession thereof; admitted the making of the contract above referred to, and that the same has been recorded, and admitted that by virtue of said contract the appellants claimed title to said property. For a further answer and cross-complaint the appellants alleged that, on the 21st day of September, 1909, respondent was the owner of the land in controversy; that she had appointed Parker as her agent to sell and dispose of said land, and to represent her in transactions affecting the same; that she held the said Parker out to the world as her general agent for the purpose of handling and disposing of said lands, and gave him full and complete power and authority therefor, with power to contract for the sale thereof and to sell the same, at the price and on the terms agreed upon between respondent and said Parker; that under said authority Parker had full power to sell and dispose of said lands and to enter into a contract for the sale and disposal thereof; that in pursuance of such authority, Parker did sell the land to the appellants in accordance with the terms set forth in the contract, and that the appellants have fully performed the terms of said contract and stand ready to carry out the same, making the tenders due under the contract, and demanding a deed therefor, which plaintiff refused to execute. Also alleged that they are ready and willing to pay the remainder of the purchase price into court, and demanded that the respondent be required to deed the land to them. The case was tried by the court without a jury, and resolves itself into the question whether, under the facts as disclosed by the record, Parker had authority to bind the respondent by the contract which he executed on her behalf to the appellant Rudolph Wenzel; whether he was expressly authorized thereto by respondent; if not, whether his agency was of such a character as to

carry with it the power to make a contract binding upon the respondent, or, if not, whether respondent has ratified the contract.

The court found that the respondent was the owner in her own separate right in fee simple of the land in controversy; that Parker, assuming to act as agent, did, without any authority so to do, enter into a pretended contract in writing with the defendant Rudolph Wenzel, setting forth the contract; that said pretended contract was signed "Annie Cowing-Caldwell, by Ed. Parker, her agent;" and also by the defendant Rudolph Wenzel; that said signature of plaintiff's name thereto by said Ed. Parker was not authorized by said plaintiff; that said Ed. Parker never had any right or authority to enter into any agreement contained in said pretended contract; that plaintiff has at all times repudiated said contract and each and every of the terms thereof, and has not received and is not holding any money or other consideration for any agreement in said contract, and has not in any way ratified any agreement in said contract; and as a conclusion of law found that the said contract as recorded became, was, and is a cloud upon plaintiff's title to the land described, and that the defendants' claim is, and was, without foundation in law or equity; and judgment followed the findings and conclusions.

From an examination of the testimony, which is not particularly extensive, we are of the opinion that the findings of the court were abundantly warranted by said testimony; and there being no other assignment of error, and no question involving any legal principle, the judgment is affirmed.

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Of estate of decedent, see EXECUTORS AND ADMINISTRATORS.

AFFIDAVITS:

See DEPOSITIONS.
Impeaching verdict of jury, see CRIMINAL LAW, 10.
Of prosecuting attorney in information, see INDICTMENT AND INFORMATION, 1.
For service of process by publication, see PROCESS.

AGENCY:

See PRINCIPAL AND AGENT.

AGREEMENT:

See CONTRACTS.

AGRICULTURE:

Contracts for irrigation, see WATERS AND WATER COURSES.

ALLOWANCE:

Of expenses against decedent's estate, see EXECUTORS AND ADMINISTRATORS.

AMBIGUITY:

Parol evidence to explain writing, see EVIDENCE, 4, 5.
Parol evidence to explain stipulation for assessment to property damaged by improvement, see MUNICIPAL CORPORATIONS, 5.
Of instructions to agent, see PRINCIPAL AND AGENT, 6.

AMENDMENT:

Of ordinance pending appeal as cessation of controversy, see APPEAL AND ERROR, 2.
On appeal or writ of error, see APPEAL AND ERROR, 4.
Record on appeal, see APPEAL AND ERROR, 10.
Of pleading, see PLEADING, 6-9.

ANSWER:

Plea in abatement, see ABATEMENT AND REVIVAL.
In pleading, see PLEADING, 2-4, 6, 7.

APPEAL AND ERROR:

Harmless error in criminal prosecutions, see APPEAL AND ERROR, 8, 12.
Election contest, see ELECTIONS.
Condemnation proceedings, see EMINENT DOMAIN, 9.
Review of discretion of officers in denying reinstatement of member in mutual life insurance company, see INSURANCE, 5.
Order of subrogation on decision on appeal, see MARSHALING ASSETS.
Assessment for public improvements, see MUNICIPAL CORPORATIONS, 9, 10.

II. NATURE AND GROUNDS OF APPELLATE JURISDICTION.

1. APPEAL — DECISIONS REVIEWABLE — DISMISSAL — MOOT QUESTIONS. Where a court has erroneously found that one tenant in common has priority in the right to redeem from a mortgage foreclosure sale, and can maintain an action against the other to enforce the same, an appeal therefrom will not be dismissed for want of any controversy, on the theory that redemption by either inures to the benefit of the other; since the argument goes to the merits of the case. *McSorley v. Lindsay*..... 203

IV. RIGHT TO APPEAL.

2. APPEAL — DECISIONS REVIEWABLE — CESSATION OF CONTROVERSY — DISMISSAL. A cause pending in the supreme court, arising under a certain city ordinance, will not be dismissed on the ground of cessation of the controversy by reason of the fact that the ordinance has been amended in certain particulars or reenacted, when the changes made are irrelevant to the issues presented in the pending case and the subject-matter of the suit is in no way destroyed or modified by the amendatory ordinances. *State ex rel. Linhoff v. Seattle, Renton & Southern R. Co*..... 124

APPEAL AND ERROR—CONTINUED.

V. PRESERVATION AND RESERVATION IN LOWER COURT.

3. APPEAL—PRESERVATION OF GROUNDS—VERDICT—SPECIAL FINDING—OBJECTIONS. Objection that an answer to an interrogatory submitted to the jury was too indefinite must be made when the verdict is returned, and a more definite finding requested, and cannot be first raised on appeal. *Johnson v. Washington Water Power Co.*.... 619

4. APPEAL AND ERROR—PRESERVATION OF GROUNDS—INSTRUCTIONS—OBJECTIONS—AMENDMENT. It is unavailing to object that an isntruction as to negligence of the driver of an automobile in any of the respects provided in the city ordinances "or otherwise" is outside the allegations of the complaint, in view of the rule that the complaint may be deemed amended; there being no objection that it goes beyond the evidence. *Domke v. Gunning*..... 629

5. APPEAL—PRESERVATION OF GROUNDS—EXCEPTIONS. One general exception to findings and conclusions is insufficient to secure a review of the evidence. *Pease v. Clayton*..... 26

6. SAME. Error cannot be assigned on denying a new trial where the motion was based upon the record and evidence and no adequate exceptions preserved. *Pease v. Clayton*..... 26

VI. PARTIES.

7. APPEAL—PARTIES—DISMISSAL. The appeal of an intervener cannot be dismissed on the ground that it is not a necessary or proper party, where it was brought in below as a necessary party defendant, and no exception or appeal was taken from the order bringing it in. *Anderson v. Osborn*..... 400

VII. REQUISITES AND PROCEEDINGS FOR TRANSFER OF CAUSE.

8. APPEAL—NOTICE—TIME FOR TAKING—PHYSICIANS AND SURGEONS. Rem. & Bal. Code, § 8399, requires that an appeal to the supreme court from an order of the superior court on appeal from the medical board must be taken within sixty days, and an appeal not so taken will be dismissed. *Stewart v. State Board of Medical Examiners*..... 59

X. RECORD.

9. APPEAL—RECORD—NECESSITY. Error assigned on overruling a demurrer to a complaint cannot be considered on appeal where the demurrer is not in the record. *Pease v. Clayton*..... 26

10. APPEAL—RECORD—STATEMENT OF FACTS—NOTICE. A statement of facts will not be struck out because the notice of settlement failed to name the "place" of settlement, where amendments were proposed and accepted but for one immaterial change; since it in effect became an agreed statement. *Stelter v. Fowler*..... 345

APPEAL AND ERROR—CONTINUED.

11. SAME. Where the certificate of a statement of facts shows that it was certified by the judge who tried the case, the notice of settlement will not be held defective for failure to state the fact. *Stelter v. Fowler* 345

XVI. REVIEW.

12. APPEAL — REVIEW — CROSS-APPEAL — NECESSITY. The respondent having failed to appeal from a judgment in favor of appellant for costs, error therein cannot be corrected on affirming the judgment against appellant. *Thomson v. Koch*..... 438

13. APPEAL—REVIEW—FINDINGS. Findings upon conflicting evidence will not be disturbed on appeal where the trial court heard and saw most of the witnesses and the evidence abundantly supports the findings. *Matzger v. Page*..... 170

14. APPEAL—REVIEW—FINDINGS. Findings upon conflicting evidence, fully supported, will not be disturbed on appeal. *Naden v. Christopher* 413

15. APPEAL AND ERROR—REVIEW—FINDINGS — PREPONDERANCE OF EVIDENCE. In an action for personal injuries tried to the court, in which there were but two witnesses to the accident, apparently of equal credit, who testified to entirely different facts, and the record on appeal fails to show that plaintiff has sustained his case by a preponderance of the evidence, a judgment for the plaintiff based upon the trial judge's rule "to resolve doubts in favor of the weak and lowly and against the strong and powerful," is not conclusive on appeal, but will be reversed and the action dismissed, notwithstanding plaintiff produced sufficient evidence to sustain the judgment. *Sparks v. Bemis Brothers Bag Co*..... 625

16. APPEAL—REVIEW—VERDICT. A verdict supported by substantial evidence will not be disturbed on appeal because of conflict in the testimony. *Edwards v. Seattle, Renton & Southern R. Co*..... 77

17. APPEAL—REVIEW—VERDICTS. Where there is no evidence to sustain the verdict, it will be set aside on appeal. *Anderson v. Osborn* 400

18. APPEAL — REVIEW — VERDICTS — EXCESSIVENESS — SUCCESSIVE VERDICTS—DAMAGES. Although a verdict for $1,000 for insults to a passenger was set aside as excessive, a second verdict for $1,200, on much the same evidence, will not be set aside for excessiveness, where it is not probable that a third trial would result differently. *Caldwell v. Northern Pac. R. Co*..... 420

19. APPEAL—REVIEW—VERDICT. Where the evidence is hopelessly in conflict, the verdict is conclusive upon appeal. *Johnson v. Washington Water Power Co*..... 619

APPEAL AND ERROR—CONTINUED.

20. APPEAL—REVIEW—HARMLESS ERROR—PLEADINGS. After a trial on the merits in an action tried to the court without reference to technical rulings on the pleadings, assignments of error on such rulings will not be reviewed. *Gottschalk v. Meisenheimer*..... 299

21. APPEAL—REVIEW—HARMLESS ERROR—COMMENT ON FACTS. Error, if any, in commenting upon evidence relating to the filing of a claim is not prejudicial where there was no issue at the trial in relation thereto and the evidence was undisputed. *Hewitt v. Seattle* 377

22. APPEAL—REVIEW—HARMLESS ERROR—ARGUMENT. A verdict awarding damages for a lot condemned will not be reversed for comment by counsel on the immaterial fact that the owner was the only competitor in the city of the Standard Oil Company, the relator being in no way connected with such company. *Chicago, Milwaukee & Puget Sound R. Co. v. True*..... 646

23. APPEAL—REVIEW—HARMLESS ERROR — OBJECTIONS TO EVIDENCE — PLEADING—ISSUES. In an action on contract for services, put in issue by a general denial, it is not error to refuse to strike evidence of a waiver by plaintiff of the contract, on motion made near the close of the trial, where much evidence of that nature had been admitted without objection. *Buttz v. Cook*..... 90

24. APPEAL—REVIEW—HARMLESS ERROR—IMMATERIAL EVIDENCE. Upon an issue as to the value of a lot used for storing oil, it is not prejudicial error to allow the owner to testify that he was the only competitor of the Standard Oil Company in the city, although the evidence was immaterial. *Chicago, Milwaukee & Puget Sound R. Co. v. True*..... 646

25. SAME — HARMLESS ERROR — EVIDENCE — CURED BY INSTRUCTIONS. Upon an issue as to the value of a lot condemned, it is not reversible error to allow the owner to testify as to the business for which the lot was used and the volume or extent of such business, when the jury were instructed that the business was shown solely for showing the use to which the property was adapted and they could not consider the volume or extent of such business or injury thereto. *Chicago, Milwaukee & Puget Sound R. Co. v. True*..... 646

26. SAME. Upon an issue as to the value of a lot, where, in an answer to a question as to whether witness had ever heard of a sale in the vicinity at plaintiff's valuation, the witness stated that he had bought a lot at a certain price, paid part in cash and balance in other property, it is not prejudicial error to refuse to strike the answer, allowing it to go to the jury "for what it is worth." *Chicago, Milwaukee & Puget Sound R. Co. v. True*..... 646

27. SAME—ADMISSION OF EVIDENCE. Error in admitting plaintiff's evidence of the declaration of defendant's agent to prove his agency

APPEAL AND ERROR—CONTINUED.

is cured where the agent was called as a witness by defendant and corroborated the statement by testifying to the same thing. *Hewitt v. Seattle*..... 377

28. APPEAL—REVIEW—HARMLESS ERROR. A verdict in favor of defendants cures error in refusing to sustain a challenge to the sufficiency of the evidence. *Aldrich v. Inland Empire Telephone & Telegraph Co.* 173

29. APPEAL — REVIEW — HARMLESS ERROR — TENDER — CURING ERROR—VERDICT. Where a check was tendered plaintiff of the amount due, less interest, and was refused and held subject to defendants' order because it did not include interest, an offer to cash the check, made by defendants before judgment, cures any errors leading up to a verdict for the interest only. *Buttz v. Cook*..... 90

30. APPEAL — REVIEW — HARMLESS ERROR — EVIDENCE. The erroneous admission of a deed which was no evidence of legal title is harmless, where the court found on other evidence that the grantee was the owner of the premises. *Malsch v. Waggoner*..... 470

31. SAME — EXCLUSION OF EVIDENCE. Error in the exclusion of evidence to show the joint liability of one of the defendants is harmless where the verdict was against such defendant. *Buttz v. Cook* 90

32. APPEAL—REVIEW—HARMLESS ERROR—INSTRUCTIONS. In an action for personal injuries, an instruction stating the measure of damages, "even though the amount is for a large sum," while objectionable, is not necessarily prejudicial, where the amount was limited to the sum claimed in the complaint. *Myhra v. Chicago, Milwaukee & Puget Sound R. Co.*..... 1

33. APPEAL—REVIEW—INSTRUCTIONS—TRIAL—HARMLESS ERROR. Upon a general verdict, the erroneous submission of the case upon the coal mining statute is not harmless, and a new trial is necessary, although there was sufficient evidence to go to the jury upon the common law liability. *Hemmingson v. Carbon Hill Coal Co.*... 28

34. APPEAL—REVIEW—HARMLESS ERROR—INSTRUCTIONS. Error in defining contributory negligence where there was no evidence thereof is superfluous and not prejudicial to defendant. *Beseloff v. Strandberg* 36

35. SAME. Stating that assumption of risks means that "he took the chances of it" is not prejudicial error where the instructions as a whole fairly defined assumption of risks. *Beseloff v. Strandberg* 36

36. APPEAL—HARMLESS ERROR—TRIAL—INSTRUCTIONS. The giving of an instruction that is too broad is not error where other instructions embodying the limitations thereon were properly given. *Edwards v. Seattle, Renton & Southern R. Co.*..... 77

APPEAL AND ERROR—CONTINUED.

37. APPEAL—REVIEW—HARMLESS ERROR. In an action of unlawful detainer, it is not prejudicial error that the court refused to quash the writ of restitution, where the defendant had not been disturbed in his possession, and upon final judgment for plaintiff, appealed and gave a supersedeas bond conditioned that he would abide the judgment of the court. *Westmoreland Co. v. Howell*..... 146

38. APPEAL—REVIEW—HARMLESS ERROR—INSTRUCTIONS. In an action against a carrier a specific instruction is not objectionable as failing to point out the distinction between unintentional and wanton wrong, where by another instruction the jury were told that to recover more than nominal damages wanton or wilful disregard of plaintiff's rights must be shown. *Caldwell v. Northern Pac. R. Co.* 420

XVII. DETERMINATION AND DISPOSITION OF CAUSE.

39. APPEAL — DECISION — SUBSEQUENT APPEAL — LAW OF CASE — JUDGMENT—CONCLUSIVENESS. A decision of the supreme court directing judgment against certain parties for a certain sum for boomage charges is final and conclusive, on a second appeal, as to the jurisdiction of the court and the liability of the several parties, where all the questions presented were, or might have been, raised on the first trial. *State ex rel. Nicomen Boom Co. v. North Shore Boom & Driving Co.* 436

40. APPEAL AND ERROR—DECISION—REMAND. The dismissal of a case tried to the court, upon excluding plaintiff's evidence, results in a mistrial, as the supreme court cannot try the cause *de novo*, or preclude the defendants from making their defense. *Collins v. Hoffman* 278

41. APPEAL — DECISION — REMAND. Where the plaintiff's testimony shows that the verdict included the amount of an item improperly charged to the defendants, the judgment will be reversed and remanded with directions to reduce the same in such amount. *Alden v. Hanson* 284

42. APPEAL—DECISION—REMAND. A remand, with directions to ascertain the damages under the issues presented, requires a retrial conformable to the applicable rules of law. *Stelter v. Fowler*.. 345

43. APPEAL—DECISION—REMAND—PROCEEDINGS BELOW. Upon reversing and remanding a case with instruction to determine the rights of the parties under the betterment act, a supplemental answer setting up the bar of a judgment in favor of third parties is demurrable; as the decision on appeal is conclusive. *Gould v. White*. 406

44. SAME. Upon remanding a case, because of insufficiency of the evidence to fix the value of property, additional evidence of the value is properly taken. *Gould v. White*..... 406

APPLIANCES:

Liability of employer for defects, see MASTER AND SERVANT.

APPLICATION:

For appointment of guardian, see INSANE PERSONS.
Of proceeds of loan, see MORTGAGES, 4.
Proceeds of sale on foreclosure of mortgage notes, see MORTGAGES, 6.

APPOINTMENT:

Of guardian, see INSANE PERSONS.

ARGUMENT OF COUNSEL:

In criminal prosecutions, see CRIMINAL LAW, 8.
In civil actions, see TRIAL, 1.

ARTICLES:

Copy of as proof of incorporation, see EMINENT DOMAIN, 10.

ASSAULT:

On passenger by street car conductor, see CARRIERS, 6, 7.
Conviction of lesser degree of offense, see INDICTMENT AND INFORMATION, 4.

1. ASSAULT AND BATTERY—AGGRAVATED ASSAULT—DEADLY WEAPON—EVIDENCE—SUFFICIENCY. The evidence supports a conviction for assault with a deadly weapon with intent to commit bodily injury, no considerable provocation appearing therefor, under Rem. & Bal. Code, § 2746, where it appears that the accused placed a loaded pistol against the person of the prosecuting witness, threatening to kill her, and desisted only when interrupted by an officer. *State v. Crist* 326

ASSESSMENT:

Accepting delinquent assessment as waiver of right to forfeit policy, see INSURANCE, 6.
Of expenses of public improvements, see MUNICIPAL CORPORATIONS, 5-10.
Of tax, see TAXATION, 1, 2.

ASSIGNMENT:

See BILLS AND NOTES, 2.
Rights of assignee of vendor after default of vendee, see VENDOR AND PURCHASER, 5.

ASSUMPTION:

Harmless error in instructions defining assumed risk, see APPEAL AND ERROR, 35.
Of risk by employee, see MASTER AND SERVANT, 11-14, 21, 22, 29.
Of facts in charge to jury, see TRIAL, 4.

ATTORNEY AND CLIENT:

Misconduct of counsel as ground for reversal, see APPEAL AND ERROR, 22.

Argument and conduct of counsel at trial in criminal prosecutions, see CRIMINAL LAW, 8.

Contract by husband for attorney's fees, see HUSBAND AND WIFE, 4.

Privileged communications, see TAXATION, 6; WITNESSES, 2, 3.

Argument and conduct of counsel at trial of civil action, see TRIAL, 1.

1. ATTORNEY AND CLIENT—COMPENSATION—AMOUNT—CONTRACT—EVIDENCE—SUFFICIENCY. The evidence supports findings to the effect that attorneys contracted to foreclose a mortgage for $500 only in case no defense was made, where they so testified and it appears that the client represented that no defense would be made and none was contemplated; and a vigorous defense having been made without any agreement covering that contingency, they were entitled to recover a reasonable fee. *Murray v. Trumbull & Trumbull*.... 336

2. ATTORNEY AND CLIENT — COMPENSATION — CONTRACT — LIABILITY—CONSTRUCTION. Where one of the heirs interested in property knows of and sanctions the employment of an attorney on behalf of all the heirs to recover the property, she is liable for her share of the reasonable value of his services and disbursements, but not for the amount agreed to be paid him, where she had no knowledge of the particular contract under which he was employed. *Abel v. Hansen* 492

3. SAME. An heir interested who made a contract on behalf of co-heirs employing an attorney to represent all the heirs in recovering property, is not liable on the contract for more than his proportionate share, in case the contract is repudiated by the other heirs; especially where that would be contrary to the intent as evidenced by the fact that he would be liable for more than the value of his interest in the property. *Abel v. Hansen*..... 492

AUTHORITY:

Of land commissioner to cancel state oyster deed, see CONSTITUTIONAL LAW, 2.

Of city to grant franchise to railway for use of streets, see MUNICIPAL CORPORATIONS, 11-16.

Of agent, see PRINCIPAL AND AGENT, 3, 4.

To cancel state oyster land deed, see PUBLIC LANDS, 4, 5.

AUTOMOBILES:

Injuries to pedestrian in city streets, see MUNICIPAL CORPORATIONS, 17, 21-27.

BAR:

See ELECTION OF REMEDIES.

Pleading decision before final judgment as bar to action, see ABATEMENT AND REVIVAL, 2.

BAR—CONTINUED.

Decision as law of case on second appeal, see APPEAL AND ERROR, 39.
Of action by former adjudication, see JUDGMENT, 2-7.
Of action by limitation, see LIMITATION OF ACTIONS.

BARRICADES:

In city street as curb for purpose of compliance with regulations by drivers of automobiles, see MUNICIPAL CORPORATIONS, 26.

BATTERY:

See ASSAULT AND BATTERY.

BENEFITS:

Assessment of benefits caused by local improvement, see MUNICIPAL CORPORATIONS, 5-10.

BEQUESTS:

See WILLS.

BILLS AND NOTES:

Bona fide holder of receipts given by agent for advances, see INSURANCE, 2.
Order for sale of note in probate as adjudicating obligation of maker, see JUDGMENT, 6.
Right to jury trial in action to establish and recover on lost notes, see JURY, 1.
Subrogation to rights in, see MARSHALING ASSETS.
Foreclosure of mortgage notes, see MORTGAGES, 5, 6.
Exemption of homestead from judgment on note, see PUBLIC LANDS, 3.
Tender of interest on mortgage note, see TENDER, 1.
Discounting of "wheat" note as usurious transaction, see USURY.
Crediting specific legacy on note, see WILLS.

1. BILLS AND NOTES—CONSIDERATION—FAILURE. A note given in consideration of an agreement to convey and furnish water to land on or before a certain date is based upon a valuable consideration, and there can be no failure of consideration until breach of the contract. *Moyses v. Bell*..... 534

2. BILLS AND NOTES — NEGOTIABILITY — INDORSEMENT. The indorsement of a nonnegotiable "wheat" note, operates merely as an assignment and does not make the assignor liable thereon. *Thomson v. Koch* 438

3. BILLS AND NOTES—NEGOTIABILITY—RESTRICTIONS. A contract not to negotiate a note to banks in the city of S., where the maker deals or is acquainted, indicates an assent that it may be otherwise negotiated. *Moyses v. Bell*..... 534

BILLS AND NOTES—CONTINUED.

4. BILLS AND NOTES — INDORSEES — NOTICE AND PRESENTMENT — EVIDENCE—SUFFICIENCY. There is sufficient evidence to sustain a finding that a note remained in the custody of an indorser, as agent of the owner, from the time it was made until it came due, so that notice of dishonor was not necessary, where he had had such possession as such agent and delivered it to an attorney for collection, since it was under his control and constructively in his possession. *Gleeson v. Lichty* 656

5. SAME—NOTICE OF DISHONOR—SUFFICIENCY. Where an indorser of a note had its custody for collection as agent for the owner it was his duty to present it for payment, and knowing that the maker was in the hands of a receiver and that presentment would be an idle ceremony, he was not entitled to further notice as an indorser, under Rem. & Bal. Code, § 3486, providing for either written or oral notice. *Gleeson v. Lichty* 656

6. SAME — BONA FIDE HOLDER — CONSIDERATION — FAILURE — NOTICE. The transferee of a note is not deprived of his character as *bona fide* holder in due course by knowledge that it was given in consideration of an executory contract, where he had no notice of any breach of the contract at the time the same was transferred to him. *Moyses v. Bell* 534

7. BILLS AND NOTES—BONA FIDE HOLDERS—TITLE FROM—STATUTES. Under Rem. & Bal. Code, § 3449, providing that a holder of a note who derives title through a holder in due course, and is not a party to any fraud or illegality affecting the instrument, has all the rights of such former holder, a *bona fide* holder in due course can pass a good title after maturity, although there has since been a failure of consideration as between the original parties, to the knowledge of the last assignee. *Moyses v. Bell* 534

8. SAME — BONA FIDE HOLDERS — WHO ARE—CONSIDERATION—EXECUTORY CONTRACT. A bank taking as collateral security a note given in consideration of a perpetual water right, before maturity and before any failure of consideration by default on the water contract, is a holder in due course, as defined by Rem. & Bal. Code, § 3443. *Moyses v. Bell* 534

9. SAME—TRANSFER—"DEFECTIVE" TITLE — STATUTES—CONSTRUCTION. The title to a note, given in payment of a perpetual water right, is not defective as defined by Rem. & Bal. Code, § 3446, where the maker's signature was not obtained by fraud or unlawful means or an illegal consideration and it was negotiated before its consideration had failed. *Moyses v. Bell* 534

10. SAME — BONA FIDE HOLDER — BURDEN OF PROOF. Under Rem. & Bal. Code, § 3450, where the title to a note is not defective, the burden can never be upon the holder of a note to show that he is a holder in due course. *Moyses v. Bell* 534

BILLS AND NOTES—CONTINUED.

11. BILLS AND NOTES—MATURITY—OPTION OF PAYEE—WAIVER—TENDER. The option to hasten the maturity of a note, for nonpayment of interest, is for the benefit of the payee, and is waived unless exercised before tender of the amount due. *Matzger v. Page*..... 170

12. BILLS AND NOTES—ACTIONS—FINDINGS—ADMITTED INDORSEMENT—EFFECT. An indorsee of a note in blank being liable as an indorser, if dishonored and notice given, regardless of actual consideration, under Rem. & Bal. Code, §§ 3458, 3457, and 3420, a finding that by the indorsement, which was admitted, defendant promised to pay the note etc., is not error, where by other findings, dishonor and notice were established. *Gleeson v. Lichty*..... 656

BLACKLISTING:

Objection to employment of person as blacklisting, see MASTER AND SERVANT, 2.

BONA FIDE HOLDER:

Of receipts given by agent for advances, see INSURANCE, 2.
Of illegal state warrants, see STATES.

BONA FIDE PURCHASER:

See MORTGAGES, 1, 2.
Of bill of exchange or promissory note, see BILLS AND NOTES, 6-10.

BONDS:

See INJUNCTION.
Superseding judgment on appeal from election contest, see ELECTIONS.
Municipal bonds, submission to vote, see MUNICIPAL CORPORATIONS, 28.
Sureties on bonds, see PRINCIPAL AND SURETY.

BONUS:

To tenant on terminating tenancy, see LANDLORD AND TENANT, 2-4.

BOOKS OF ACCOUNT:

Admissibility in evidence, see EVIDENCE, 2, 3.

BOUNDARIES:

Review of decision of commissioners in determining boundary of local improvement, see MUNICIPAL CORPORATIONS, 9.

BREACH:

Right to accounting on breach of contract, see ACCOUNT.
Of contract of carriage, see CARRIERS, 1-5.
Of contract in general, see CONTRACTS.
Of contract to lease, see LANDLORD AND TENANT, 1.
Correction of defect on breach of guaranty and right to lien, see MECHANICS' LIENS, 2.
Of contract of sale, see SALES.
Of warranty, see SALES, 3-6.
Of land contract, see VENDOR AND PURCHASER.
Of contract to irrigate lands, see WATERS AND WATER COURSES.

BROKERS:

See PRINCIPAL AND AGENT, 1, 2, 7.

1. BROKERS—COMMISSIONS—CONTRACTS — CONSTRUCTION. A broker's commissions are payable out of the proceeds of the sale, and not unconditionally at the time deferred payments of the purchase price are made, where the contract provided that one-half of the total commissions shall be deducted from the first payment, the balance to run according to the terms of the sale contracts, that is, divided into as many payments as the contracts call for; especially where the parties at first so construed it and acted accordingly for some time. *Malloy v. Interstate Irrigation Co*..... 487

2. SAME. In such a case, proportionate commissions are properly allowed upon partial payments received in compromise of cancelled contracts. *Malloy v. Interstate Irrigation Co*..... 487

BUILDINGS:

Affected by mechanics' liens, see MECHANICS' LIENS.
Negligence of independent contractor, see NEGLIGENCE.
Contracts of suretyship, see PRINCIPAL AND SURETY.

BURDEN OF PROOF:

To show holder in due course, see BILLS AND NOTES, 10.
To show facts in mitigation of damages for breach of contract, see CONTRACTS, 4.
In action to foreclose pledge of corporate stock, see PLEDGES.
To show ability to mitigate damages, see SALES, 11.
Payment for services, see WORK AND LABOR, 2.

CANCELLATION OF INSTRUMENTS:

See EXCHANGE OF PROPERTY.
Cancellation of state oyster deed, see CONSTITUTIONAL LAW, 2.
Of contract, see CONTRACTS, 1.
Rescission of sale of corporate stock for fraud, see CORPORATIONS, 1.
Dismissal of action to cancel note and mortgage as affecting intervener's rights as holder, see DISMISSAL AND NONSUIT.
Vacation of default judgment, see JUDGMENT, 1.
Rescission of lease, see LANDLORD AND TENANT, 2-4.
State oyster land deed, see PUBLIC LANDS, 4, 5.
Rescission of contract of sale, see SALES, 2, 9.
Statutes providing for cancellation of state oyster deed, see STATUTES, 3.
Rescission of land contracts, see VENDOR AND PURCHASER, 2, 3, 5, 9.

1. CANCELLATION OF INSTRUMENTS—GROUNDS—MISTAKE—UNILATERAL MISTAKE. Equity will afford relief by the cancellation of an option on the mistake of only one party as to its meaning, where his manifest intent was to grant an option limited to one year for the purpose of perfecting title, the agreement as drawn failed to express

CANCELLATION OF INSTRUMENTS—CONTINUED.

the agreement intended, and after three years the title was not perfected and might never be, and the other party could be placed in his former position without working any injustice. *Murray v. Sanderson*..... 477

CARRIERS:

Excessive verdict for injury to passenger, see DAMAGES, 4.

Condemnation of property for railroad, see EMINENT DOMAIN, 1-6, 8.

1. CARRIERS—PASSENGERS—WHO ARE—REFUSAL TO PAY FARE. Street car passengers who had paid fare and were entitled to ride to the end of the line are not entitled to ride in any and all cars, and upon voluntarily leaving a car before reaching their destination, they cease to be passengers and are entitled to ride in another car only by payment of another fare. *Leclaire v. Tacoma R. & Power Co.* 157

2. SAME — BREACH OF CONTRACT OF CARRIAGE — EXCUSE. The fact that thirty or forty persons boarded a street car and refused to pay fare, and that the employees were unable to eject them, does not excuse the company for breach of contract to carry to her destination a passenger whom the company had received on the car for such transportation, and who had paid her fare. *Leclaire v. Tacoma R. & Power Co*..... 157

3. SAME—DELAYS—DEGREE OF CARE. A street car company must exercise only ordinary care to guard against delays by the illegal acts of third persons. *Leclaire v. Tacoma R. & Power Co*..... 157

4. CARRIERS — BREACH OF CONTRACT — DAMAGES — EXCESSIVE VERDICT. A verdict for $1,000, reduced by the trial judge to $750, is grossly excessive and should be reduced to $100, where the plaintiff, a passenger on a street car, was delayed and refused transportation from about seven o'clock in the evening until one o'clock a. m., and reached home by team about three o'clock, only suffering inconvenience and a slight cold and loss of one day's time; and it is immaterial that the costs of appeal in the case amount to approximately $250, since the amount was exclusively in her control. *Leclaire v. Tacoma R. & Power Co*..... 157

5. CARRIERS—PASSENGERS—ACTIONS—INSTRUCTIONS. In an action by a passenger against a railroad company for breach of its contract of carriage, it is proper to instruct the jury as to the duty of the carrier to furnish seats, where the plaintiff contended that she was compelled to sit on the floor of a car for want of suitable seats. *Caldwell v. Northern Pac. R. Co*..... 420

6. CARRIERS—OF PASSENGERS—ASSAULT BY CONDUCTOR—INSTRUCTIONS. In an action by a passenger for an assault by a street car conductor, an instruction that there can be no recovery if plaintiff had alighted from the car and provoked the assault before he was struck, is not objectionable as leaving an inference of liability for assault after plaintiff had ceased to be a passenger, unless he provoked the assault. *Johnson v. Washington Water Power Co*..... 619

CARRIERS—CONTINUED.

7. SAME—TERMINATION OF RELATION—INSTRUCTIONS. In an action by a passenger for an assault by a street car conductor, the jury are properly instructed that after a person becomes a passenger the relation exists until he has alighted and had a reasonable time to leave the place at which he alights, and if assaulted before he could leave the immediate presence of the car and proceed on his journey, he was still a passenger. *Johnson v. Washington Water Power Co.*. 619

CERTIFICATE:

To statement of facts or bill of exceptions, see APPEAL AND ERROR, 14.
Tax certificate, see TAXATION, 6.

CERTIORARI:

Review of condemnation proceedings, see EMINENT DOMAIN, 9.

CESSATION OF CONTROVERSY:

On appeal, see APPEAL AND ERROR, 1, 2.

CHARACTER:

Previous chaste character as defense, see RAPE.

CHARGE:

To jury in criminal prosecutions, see CRIMINAL LAW, 12.
To jury in civil actions, see TRIAL, 4-7.

CHARTER:

Establishment of commission form of government as abolishing republican form guaranteed by Federal constitution, see CONSTITUTIONAL LAW, 1.
Of municipal corporation, see MUNICIPAL CORPORATIONS, 1-3, 29.
Adoption of by cities of first class, see STATUTES, 4.

CITATION:

See PROCESS.
On appeal, see APPEAL AND ERROR, 8.

CITIES:

See MUNICIPAL CORPORATIONS.

CLAIMS:

Against state, auditing of, see STATES.

CLASSIFICATION:

Erroneous classification of public lands, see PUBLIC LANDS, 1, 2.

CODEFENDANTS:

Statements as evidence in criminal prosecution, see CRIMINAL LAW, 1.

COLLATERAL SECURITY:

Foreclosure by pledgee, see PLEDGES.

COMMENT:

On evidence at trial, see MUNICIPAL CORPORATIONS, 24.

COMMERCIAL PAPER:

Discounting of as usurious transaction, see USURY.

COMMISSIONERS:

Power of land commissioner to cancel state oyster deed, see CONSTITUTIONAL LAW, 2; PUBLIC LANDS, 4, 5.
Adoption of commission form of government, see MUNICIPAL CORPORATIONS, 2, 3.
Assessment by for local improvement, see MUNICIPAL CORPORATIONS, 6, 9.
Orders of railroad commission, see RAILROADS.

COMMISSIONS:

Of broker, see BROKERS.
To take testimony, see DEPOSITIONS.
Of insurance agent, see INSURANCE, 1.

COMMON CARRIERS:

See CARRIERS.

COMMUNITY PROPERTY:

See HUSBAND AND WIFE.

COMPENSATION:

Of attorney, see ATTORNEY AND CLIENT.
Of broker, see BROKERS.
For property taken or damaged for public use, see EMINENT DOMAIN, 7, 8.

COMPETENCY:

Of experts as witnesses, see EVIDENCE, 9-11.
Of witnesses in general, see WITNESSES.

COMPLAINT:

In criminal prosecutions, see INDICTMENT AND INFORMATION.
In civil actions, see PLEADING.

CONCLUSION:

Of witness, see EVIDENCE, 8-10.

CONCLUSIVENESS:

Of verdict or findings on appeal, see APPEAL AND ERROR, 13-19.
Decision as law of case on second appeal, see APPEAL AND ERROR, 39, 43.
Of judgment, see JUDGMENT, 2-7.

CONDEMNATION:

Taking or damaging property for public use, see EMINENT DOMAIN.

CONDITIONS:

On lease of wire by telegraph company, see TELEGRAPHS AND TELEPHONES.

CONFIDENTIAL RELATIONS:

Disclosure of communications, see WITNESSES, 2, 3.

CONFIRMATION:

Waiver of objections to confirmation of assessment, see MUNICIPAL CORPORATIONS, 7.

CONFLICT OF LAWS:

Constitutional restriction on adoption of city charters, see MUNICIPAL CORPORATIONS, 1.

Laws relating to levy of taxes for municipal expenses, see MUNICIPAL CORPORATIONS, 29.

CONSIDERATION:

Of bill of exchange or promissory note, see BILLS AND NOTES, 1, 6-9, 12.

Failure of as ground for rescission by vendee, see VENDOR AND PURCHASER, 2.

CONSTITUTIONAL LAW:

Limitations on powers of city government in adopting charter, see MUNICIPAL CORPORATIONS, 1-3.

Laws authorizing commissioners to assess property for improvement, see MUNICIPAL CORPORATIONS, 6.

Subjects and titles of statutes, see STATUTES, 1.

1. CONSTITUTIONAL LAW — GUARANTIES — REPUBLICAN FORM OF GOVERNMENT—MUNICIPAL CORPORATIONS—CHARTERS. A city charter establishing the commission form of government, with the initiative, referendum, and recall does not abolish the republican form of government guaranteed by art. 4, § 4, of the Federal constitution; since the guarantee applies only to the state governments, and means only a representative form of government subject to the will of the people. *Walker v. Spokane*..... 312

2. CONSTITUTIONAL LAW—JUDICIAL POWERS—ENCROACHMENT ON JUDICIARY—PUBLIC LANDS — OYSTER LANDS — POWERS OF LAND COMMISSIONER. Judicial powers are not conferred on the state land commissioner by Rem. & Bal. Code, § 6804, authorizing him to cancel a state oyster deed and determine that the land shall revert to the state when the lands have been used for purposes other than oyster culture; since the state deed is not absolute but conditional and contains the conditions of the defeasance, and administrative officers may be clothed with *quasi* judicial powers, having no authority to fix a penalty. *State ex rel. Abbott v. Ross*..... 82

CONSTRUCTION:

Of contract for attorney's fees, see ATTORNEY AND CLIENT, 2, 3.
Of statute relating to defective title to bill or note, see BILLS AND NOTES, 9.
Of contract for broker's commission, see BROKERS.
Applying rule of *stare decisis* in construction of constitution, see COURTS.
Of contract providing for bonus on breach, see DAMAGES, 1.
Statutes granting right of eminent domain to railroads, see EMINENT DOMAIN, 4, 5.
Parol evidence to aid construction of contract, see EVIDENCE, 4, 5.
Statutes relating to regulation and sale of liquor, see INTOXICATING LIQUORS.
Order in probate as construction of will, see JUDGMENT, 5-7.
Of statutes relating to governmental powers of cities of first class, see MUNICIPAL CORPORATIONS, 2.
Of statutes granting power to cities to authorize construction of railroad in streets, see MUNICIPAL CORPORATIONS, 11.
Of contract of sale, see SALES, 1.
Of statutes in general, see STATUTES.
Of franchise providing for exchange of transfers, see STREET RAILROADS.
Of will, see WILLS, 1, 2.

CONSTRUCTIVE TRUSTS:

See TRUSTS.

CONTEST:

Necessity of bond to supersede judgment on appeal from election contest, see ELECTIONS.

CONTINUANCE:

1. CONTINUANCE — PLEADING—SUPPLEMENTAL COMPLAINT. In the absence of special showing of prejudice, it is not error to deny a continuance to the defendant upon allowing plaintiff to file a supplemental complaint, where a reasonable time appears to have elapsed before the date of the trial. *Edwards v. Seattle, Renton & Southern R. Co.* 77

CONTRACTORS:

Subcontractors, who are and right to file lien, see MECHANICS' LIENS, 4.

CONTRACTS:

See ATTORNEY AND CLIENT; BILLS AND NOTES; HUSBAND AND WIFE; INSURANCE; SALES.
Right to accounting on breach, see ACCOUNT.
For broker's commissions, see BROKERS.
Cancellation, see CANCELLATION OF INSTRUMENTS.

CONTRACTS—CONTINUED.

Breach of contract of carriage, see CARRIERS, 1-5.
Liquidated damages or penalties, see DAMAGES, 1.
Admission of parol or extrinsic evidence, see EVIDENCE, 4, 5, 7.
Agreements within statute of frauds, see FRAUDS, STATUTE OF.
Breach of as action tried to jury as law case, see JURY, 2.
Leases, see LANDLORD AND TENANT.
Employment, see MASTER AND SERVANT, 1, 2.
Ground for mechanics' liens, see MECHANICS' LIENS.
Limitation on powers of agent, see PRINCIPAL AND AGENT, 4.
Personal liability of agent for, see PRINCIPAL AND AGENT, 5.
Suretyship, see PRINCIPAL AND SURETY.
Specific performance, see SPECIFIC PERFORMANCE.
Sales of realty, see VENDOR AND PURCHASER.
To irrigate lands, see WATERS AND WATER COURSES.
Implied contracts, see WORK AND LABOR.

1. CONTRACTS—MODIFICATION—CANCELLATION. A modification whereby a contract for advertising space on three days in the week was changed so as to take all the space on one day of the week does not amount to a cancellation of the contract. *Star Publishing Co. v. Knosher & Co.*..... 215

2. CONTRACTS — PARTIES — PLEADING. A party defendant making a contract on behalf of two corporations should set up the fact in his answer, in order to escape personal liability, where plaintiff alleged that he made the contract acting for himself and his codefendant; and where defendants answered jointly by a general denial all are bound jointly, if the contract is proved as alleged. *Carlisle Packing Co. v. Deming*..... 455

3. CONTRACTS — BREACH — DAMAGES. Damages for breach of an advertising contract are not limited to the profits, but cover the full contract price, where the contract gave the newspaper the option to hold the space open or to utilize it for other purposes and in either event receive the full compensation fixed in the contract. *Star Publishing Co. v. Knosher & Co.*..... 215

4. SAME — MEASURE OF DAMAGES — BURDEN OF PROOF. *Prima facie*, the measure of damages for the breach of an advertising contract is the contract price, and the burden is upon the party in default to show facts in mitigation thereof. *Star Publishing Co. v. Knosher & Co.*..... 215

5. CONTRACTS—ACTION FOR BREACH—EVIDENCE—QUESTION FOR COURT. In an action on contract for services, a verdict for the plaintiff is properly directed, where the contract was admitted and the defendant's evidence showed the amount due thereon to be substantially the sum found by the court. *Eaton v. General Compressed Air & Vacuum Machinery Co.*..... 373

CONTRIBUTORY NEGLIGENCE:

Harmless error in instructions on, see APPEAL AND ERROR, 34.
Of servant, see MASTER AND SERVANT, 18, 19, 21, 24-29.
Of person injured on street, see MUNICIPAL CORPORATIONS, 27.

CONVERSION:

Wrongful conversion of personal property, see TROVER AND CONVERSION.

CONVEYANCES:

See EASEMENTS; MORTGAGES.

CORPORATIONS:

See MUNICIPAL CORPORATIONS.
Acquisition of property by condemnation, see EMINENT DOMAIN.
Pledge of corporate stock, see PLEDGES.
Personal liability of officer executing contract, see PRINCIPAL AND AGENT, 5.

1. CORPORATIONS — STOCK — SALES — RESCISSION BY VENDEE — FRAUD. The false statement of the owner of corporate stock as to what it had actually cost him, for the purpose of inducing a sale, is a misrepresentation of a material fact, for which rescission and damages may be had, especially where future business relations were to grow out of the sale. *Kohl v. Taylor*..... 678

2. CORPORATIONS — OFFICERS — REPRESENTATION—FRAUD—TAXATION—SALE. The secretary and manager of a corporation cannot purchase at a tax sale property of the corporation without color of fraud against the corporation or its grantee. *Collins v. Hoffman*..... 278

3. CORPORATIONS—ACTIONS AGAINST—PARTIES—IDENTITY—ANSWER—SUFFICIENCY—QUIETING TITLE. Where the complaint in an action to quiet title alleged that defendant was a domestic corporation, it is error to sustain a demurrer to an answer and cross-complaint alleging that the defendant was a foreign corporation and setting up its title to the property, and to strike the answer, on the ground that the foreign corporation was not a party to the action; since it seems that there was but one corporation, and if served with process, the foreign corporation had an undoubted right to defend the action. *Beebe v. Northwestern Dairy Co*..... 164

4. CORPORATIONS — ACTIONS—PARTIES—JURISDICTION—PRESUMPTION—PLEADING—COMPLAINT. Rem. & Bal. Code, § 4854, providing that a corporation may be sued in a county wherein it has an office for the transaction of business, or an agent upon whom service may be made, does not require the fact to be affirmatively alleged, nor make a complaint demurrable for want of jurisdiction, where the fact does not appear on its face, since jurisdiction will in such case be presumed. *Peterson v. Pantheon Lumber Co*..... 189

CORPORATIONS—CONTINUED.

5. CORPORATIONS—ACTIONS—SERVICE OF SUMMONS — AGENTS. Under the statute authorizing actions against a foreign corporation doing business in this state by serving of summons on any agent within the state, a domestic corporation appointed the agent at L. of a foreign corporation under a contract to sell its machinery for the season of 1909, at the prices and on the terms fixed by the principals, and account for the proceeds, is an agent upon whom service of summons may be made. *Womach v. Case Threshing Machine Co.* 661

COSTS:

Items recoverable as costs of defense, see MALICIOUS PROSECUTION, 4.
Proceedings to assess property for local improvement, see MUNICIPAL CORPORATIONS, 8.

COUNCIL:

See MUNICIPAL CORPORATIONS, 2, 4.

COUNTIES:

Regulation and sale of liquor outside city or town, see INTOXICATING LIQUORS.

COURTS:

Review of decisions, see APPEAL AND ERROR.
Right of land commissioner to cancel state oyster deed as encroachment on judiciary, see CONSTITUTIONAL LAW, 2.
Leave of court to file complaint in intervention, see PARTIES.
Prohibition to restrain summoning grand jury, see PROHIBITION.
Jurisdiction of state courts, see PUBLIC LANDS, 2.

1. COURTS—STARE DECISIS—CONSTITUTION—CONSTRUCTION. The rule of *stare decisis* is peculiarly applicable to constructions of the constitution, which should not be changed except for the most cogent reasons. *In re Fifth Avenue and Fifth Avenue South*..... 218

CREDIBILITY:

Of witness, see WITNESSES, 4.

CREDITORS:

Subrogation to rights of creditor, see MARSHALING ASSETS.

CRIMINAL LAW:

See ASSAULT AND BATTERY; FALSE PRETENSES; HOMICIDE; INCEST; LARCENY; LIBEL AND SLANDER; MAYHEM; RAPE; RECEIVING STOLEN GOODS.
Indictment, information, or complaint, see INDICTMENT AND INFORMATION.
Violation of liquor laws, see INTOXICATING LIQUORS.
Impeaching witness, see WITNESSES, 4.

CRIMINAL LAW—CONTINUED.

1. CRIMINAL LAW—EVIDENCE—STATEMENTS OF CODEFENDANT—ADMISSIBILITY. In a prosecution against two persons for obtaining money under false pretenses, evidence of a conversation between the prosecuting witness and one of the defendants when the other defendant was not present is admissible, if the facts show a concert of action and that both defendants were parties to the crime, although separate trials were had and no conspiracy was charged. *State v. Williams* 286

2. CRIMINAL LAW—EVIDENCE OF ACCOMPLICES—SUFFICIENCY. A conviction of larceny by the receipt of stolen goods may be had upon the testimony of the accomplices who stole the same. *State v. Ray* 582

3. CRIMINAL LAW — IDENTIFICATION OF ACCUSED — SUFFICIENCY. A conviction will not be set aside for insufficient identification of the accused at the preliminary hearing by the prosecuting witness, where he sufficiently identified the accused at the trial. *State v. Williams* 286

4. CRIMINAL LAW — EVIDENCE — IDENTIFICATION OF MONEY — SUFFICIENCY. In a prosecution for obtaining money by false pretenses, money taken from the accused is sufficiently identified to sustain a conviction, where the prosecuting witness described it as "currency" "four twenty-dollar bills," "United States Currency" etc., and that one was a yellow bill; the weight of the evidence being for the jury. *State v. Brown*..... 293

5. SAME—ADMISSIBILITY. Upon a prosecution for obtaining four twenty-dollar bills by false pretenses, evidence that, on the day after, the sheriff found two such bills concealed in the overcoat of the accused after he had been once searched, is admissible without showing that the coat had been at all times in the possession of the accused. *State v. Brown*..... 293

6. CRIMINAL LAW—TRIAL—INDORSEMENT OF NEW WITNESSES—DISCRETION. It is not error to allow the name of a new witness to be indorsed on the information after the jury was sworn and the opening statement was made, where no surprise was claimed or continuance asked, and no abuse of discretion appears. *State v. Pepoon*.... 635

7. CRIMINAL LAW—TRIAL. In a criminal prosecution, it is not commendable practice to allow a witness to give a spectacular illustration and reproduction of a fight before the jury. *State v. Catsampas* 70

8. CRIMINAL LAW — TRIAL — MISCONDUCT OF COUNSEL — ARGUMENT—APPEAL—HARMLESS ERROR. Rem. & Bal. Code, § 339, providing that no argument shall be allowed in the opening statement, is not violated by a lengthy and detailed statement of the facts, even if some slight inferences are drawn; and no prejudice results where counsel

CRIMINAL LAW—CONTINUED.

desisted on objection made, and nothing was said not fully justified by the testimony produced. *State v. Pepoon*..... 635

9. CRIMINAL LAW — TRIAL — REOPENING CASE. It is entirely within the discretion of the trial court to reopen a prosecution for obtaining money by false pretenses to permit further identification of the money. *State v. Brown*..... 293

10. CRIMINAL LAW—NEW TRIAL—MISCONDUCT OF JURY—VERDICT—IMPEACHMENT. On motion for a new trial, a conviction of murder cannot be impeached for misconduct of the jury by affidavits on information and belief. *State v. Pepoon*..... 635

11. SAME—MAGAZINES IN JURY ROOM. It is not reversible error, in a prosecution for murder, that the court permitted two jurors to be furnished with a magazine, it not appearing that there was anything in the magazines concerning the case, especially where the question is raised on motion for a new trial; since the presumption is that the court first censored the magazines. *State v. Pepoon*..... 635

12. CRIMINAL LAW — PRESUMPTION AS TO POSSESSION OF STOLEN PROPERTY—INSTRUCTIONS—HARMLESS ERROR. Where money was found concealed on the accused when arrested shortly after a theft, it is not error to refuse an instruction that the presumption of guilt from the possession of stolen property attaches only when the money is shown to have been stolen, and is destroyed by reasonable explanation, where the jury were instructed that such presumption applies only to property identified as stolen and that they must find beyond a reasonable doubt that the accused had obtained the money charged to have been stolen. *State v. Williams*..... 286

CROSS-APPEALS:

See APPEAL AND ERROR, 12.

CROSS-EXAMINATION:

See WITNESSES, 1.
Of expert witnesses, see EVIDENCE, 10.

CUSTOM:

Evidence of custom of miners to inspect place of work, see MASTER AND SERVANT, 14.

DAMAGES:

See MALICIOUS PROSECUTION; REPLEVIN; TROVER AND CONVERSION.
Review of second verdict for excessiveness, see APPEAL AND ERROR, 18.
Harmless error in instructing as to measure of, see APPEAL AND ERROR, 32.
Breach of contract of carriage, see CARRIERS, 4.
For breach of contract, see CONTRACT, 3, 4.
Fraud in sale of corporate stock, see CORPORATIONS, 1.

DAMAGES—CONTINUED.

Compensation for property taken or damaged for public use, see EMINENT DOMAIN, 7, 8.

For breach of contract to lease premises, see LANDLORD AND TENANT, 1.

Injuries caused by public improvements, see MUNICIPAL CORPORATIONS, 5.

For threatened action of city resulting in abatement of nuisance by owner, see MUNICIPAL CORPORATIONS, 18.

Fraud in sale of property, see SALES, 2, 9.

Breach of contract of sale, see SALES, 10-12.

1. DAMAGES — LIQUIDATED DAMAGES — PENALTY — CONTRACTS — CONSTRUCTION. Where two parties agreed to be equally liable for the payment of a mortgage for $16,000 and that, on default of either to pay his part, the other party might pay the same and hold a lien for half the sum paid, and interest thereon, and a "bonus of $500 for having made such advance," the stipulation for the bonus is one for liquidated damages and not a penalty; since the inconveniences, loss, expenses and damages arising from the breach are not readily susceptible of proof and the sum is not disproportionate to the probable damage suffered. *Herberger v. Orr Co.* 526

2. DAMAGES—PERSONAL INJURIES—EARNING CAPACITY—PROBABLE PROMOTION. In an action for personal injuries sustained by a railroad trainman, an instruction allowing the jury to consider evidence of the probability of his promotion and a consequent increase of wages is not prejudicial. *Myhra v. Chicago, Milwaukee & Puget Sound R. Co.* 1

3. DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for $11,250 for injuries sustained by a railroad brakeman forty-one years of age, in good health, earning $80 to $90 a month, and who had earned $100 to $120 as a conductor, is not excessive, where there was competent evidence that his sexual vigor was impaired and that he will never be able to perform manual labor, and that his body is out of alignment and his injury most serious. *Myhra v. Chicago, Milwaukee & Puget Sound R. Co.* 1

4. DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for $8,500 for injuries to a passenger alighting from a street car, who six months thereafter was merely suffering from curable neurasthenia, is excessive and should be reduced to $5,500. *Edwards v. Seattle, Renton & Southern R. Co.* 77

5. DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for $1,500 for the loss by a stevedore of two toes, is not so excessive as to warrant the supreme court in setting it aside, where it appears that the plaintiff lost two months' time, during which he suffered great pain, and it is impossible for him to bear the full measure of his former burden in the same class of work. *Jacobsen v. Rothschild* 127

DAMAGES—CONTINUED.

6. DAMAGES—PERSONAL INJURIES—INADEQUATE VERDICT—NEW TRIAL. A verdict for $1,500 damages for the loss of a hand by a carpenter thirty-three years of age, in good health, earning forty to sixty cents an hour, and who was able to earn only fifty dollars in the eighteen months following, is so manifestly inadequate as to authorize the trial court to set it aside as given under the influence of passion or prejudice, under Rem. & Bal. Code, § 399, which places inadequate and excessive verdicts on the same footing. *Aboltin v. Heney* 65

DEBT:

Priority of mortgages given for preexisting debt, see MORTGAGES, 1.

DECEDENTS:

Estates, see EXECUTORS AND ADMINISTRATORS.

DECISION:

Pleading decision before judgment as bar, see ABATEMENT AND REVIVAL, 2.

Review on appeal, see APPEAL AND ERROR, 1.

On appeal, see APPEAL AND ERROR, 39-44; MARSHALING ASSETS.

DEEDS:

See EASEMENTS.

Cancellation of state oyster deed, see CONSTITUTIONAL LAW, 2; PUBLIC LANDS, 4, 5.

Parol evidence to explain clause in deed, see EVIDENCE, 6.

Cancellation of as election to rescind contract, see EXCHANGE OF PROPERTY.

Fraudulent insertion of exception to covenant against incumbrances, see FRAUD, 2.

Repeal of law providing for cancellation of oyster land deeds, see STATUTES, 3.

Right of vendor to pass title through third person, see VENDOR AND PURCHASER, 1.

DEFAULT:

Effect of default and forfeiture of contract after election to rescind, see EXCHANGE OF PROPERTY.

Vacation of default judgment, see JUDGMENT, 1.

In contract for sale of land, see VENDOR AND PURCHASER, 6-8.

DEFECT:

Notice of failure to comply with warranty, see SALES, 4, 5.

DEGREES:

Instructing as to lesser degree of offense, see HOMICIDE, 2.

Conviction of offense included in charge, see INDICTMENT AND INFORMATION, 4.

DELAY:

In transportation of passenger on street car, see CARRIERS, 1-5.

DEMAND:

By vendor for payment, see VENDOR AND PURCHASER, 7, 8, 10.

DEMURRER:

To information, see INDICTMENT AND INFORMATION.
Conclusiveness of judgment on demurrer, see JUDGMENT, 2.
In pleading, see PLEADING, 1, 5, 13.

DENIALS:

In pleading, see PLEADING, 3, 4, 6, 11.

DEPOSITIONS:

1. DEPOSITIONS—COMMISSION. Where a commission to take a deposition proves abortive, by reason of the refusal of a witness to sign a stenographic report, a second commission may be sued out. *Donaldson v. Winningham*..... 212

DESCENT AND DISTRIBUTION:

Inheritance and transfer taxes, see TAXATION, 9.

DILIGENCE:

As affecting right to file amended answers, see PLEADING, 7.

DISCHARGE:

From employment, see MASTER AND SERVANT, 1, 2.
From liability as surety, see PRINCIPAL AND SURETY.

DISCRETION:

Of officers to reinstate delinquent member, see INSURANCE, 5.

DISCRETION OF COURT:

Indorsement of name of new witness on information, see CRIMINAL LAW, 6.
Reopening criminal prosecution, see CRIMINAL LAW, 9.
Cross-examination of witness as to value of land, see EVIDENCE, 10.
Vacation of default judgment, see JUDGMENT, 1.
Amendment of pleading at trial, see PLEADING, 6, 7.

DISMISSAL AND NONSUIT:

Dismissal of appeal for want of actual controversy, see APPEAL AND ERROR, 1.
Dismissal of appeal on ground of cessation of controversy, see APPEAL AND ERROR, 2.
Dismissal of intervener's appeal on ground of defect of party, see APPEAL AND ERROR, 7.
Remand on appeal from dismissal, see APPEAL AND ERROR, 40.
Judgment of dismissal as *res judicata*, see JUDGMENT, 2, 3.

DISMISSAL AND NONSUIT—CONTINUED.

1. DISMISSAL AND NONSUIT—INTERVENERS—STATUTES. The dismissal of an action for the cancellation of a note and mortgage does not affect an intervener's right as holder to foreclose, under Rem. & Bal. Code, § 202, authorizing an intervener to demand relief adversely to the parties, and Id., § 203, requiring the court to determine the rights of the intervener at the same time the action is decided. *Pickle v. Anderson*..... 552

DISTRIBUTION:

Order of final distribution of estate as construction of will, see JUDGMENT, 7.

DISTRICT AND PROSECUTING ATTORNEYS:

Verification of criminal complaint on oath of prosecuting attorney, see INDICTMENT AND INFORMATION, 1.

DOCUMENTS:

Secondary evidence, see EVIDENCE, 2, 3.

EARNING CAPACITY:

As element of damages, see DAMAGES, 2.

EASEMENTS:

1. EASEMENTS—PRESCRIPTION—PERMISSIVE USE. Permissive use for twenty years of a private way across plaintiff's land to a county road does not establish an easement, where there was another practical route, plaintiff's predecessors having sold to defendant's predecessors a strip of land for the express purpose of giving access to the county road. *Malsch v. Waggoner*..... 470

2. EASEMENTS — IMPLIED GRANTS—"APPURTENANCES." The grant of land with the "appurtenances" does not infer the grant of a right of way leading to the land over an existing road, where there was no existing easement. *Malsch v. Waggoner*..... 470

EJECTMENT:

1. EJECTMENT—TITLE OF PLAINTIFF. In ejectment, the plaintiff must recover on the strength of his own title, and not on the weakness of the defendant's. *Gauthier v. Morrison*..... 572

ELECTION:

To rescind contract and effect of subsequent default on rights of parties, see EXCHANGE OF PROPERTY.

Between counts in information, see INDICTMENT AND INFORMATION, 2.

Between inconsistent defenses, see PLEADING, 2.

ELECTION OF REMEDIES:

1. ELECTION OF REMEDIES—INCONSISTENT ACTIONS—BAR. An action by the makers of a note and mortgage against the payee and others for an accounting for the proceeds thereof, constitutes an election of remedies, and precludes the plaintiffs from prosecuting an action for a cancellation, as the same are inconsistent. *Pickle v. Anderson* 552

ELECTIONS:

For issue of bonds, see MUNICIPAL CORPORATIONS, 28.

1. ELECTIONS — CONTESTS — APPEAL — BOND — SUPERSEDEAS. Under Rem. & Bal. Code, § 4956, providing for an appeal to the supreme court from a judgment in an election contest, "as in other cases" the appeal does not supersede the judgment unless a supersedeas bond is given as in other cases; § 4957 declaring that the certificate of election shall be rendered null and void by a judgment cancelling the same where no appeal is taken within ten days, merely makes the judgment a finality within that time if no appeal is taken, and does not give the appeal the effect of superseding the judgment without bond. *State ex rel. Davis v. Superior Court*..... 166

EMINENT DOMAIN:

Conclusiveness of judgment in condemnation proceedings, see JUDGMENT, 4.

Public improvements by municipalities, see MUNICIPAL CORPORATIONS, 5-10.

1. EMINENT DOMAIN — PUBLIC SERVICE — TOLL LOGGING ROAD. The power of eminent domain is not conferred for private purposes, by Rem. & Bal. Code, §§ 7106-7109, granting the right to toll logging roads, chutes, flumes, and artificial water courses for the carriage of timber products, under the requirement that the road transport all timber products offered for carriage as its means of transportation is adapted to carry, and providing that such roads shall be deemed *quasi* public companies and common carriers; and the fact that its duty is limited to the carriage of timber products does not affect the public character of the service. *State ex rel. Clark v. Superior Court* 612

2. EMINENT DOMAIN—PUBLIC SERVICE—TOLL LOGGING ROAD. The fact that all the stock of a toll logging road is held by a lumber company or its stockholders who own most of the timber accessible to the road sought to be condemned, does not deprive the road of its public character or render the enterprise a private one, where considerable other timber owned by others will be rendered accessible and can be transported over the road. *State ex rel. Clark v. Superior Court* 612

3. EMINENT DOMAIN—PROPERTY SUBJECT—STREETS — FRANCHISE. A railway company cannot condemn from abutting lot owners the right to maintain tracks in a city street without a valid franchise

EMINENT DOMAIN—CONTINUED.

from the city to the use of the street. *State ex rel. Schade Brewing Co. v. Superior Court* 96

4. SAME—EXTENT OF POWER—STATUTES—CONSTRUCTION. Rem. & Bal. Code, §§ 8739, 8740, granting to railway corporations the right of eminent domain, do not authorize condemnation of land held in trust for the public as a city street, since the law must be construed to relate to private property only, in the absence of an express or implied authority to take public lands. *State ex rel. Schade Brewing Co. v. Superior Court* 96

5. SAME—APPLICATION OF STATUTE. Rem. & Bal. Code, §§ 5717, 5718, in the act conferring the right of eminent domain upon corporations organized for the construction of any railway, macadamized road, plank road, clay road, canal, or bridge, and which authorize any company "herein mentioned" to appropriate any part of a public road or street, upon terms to be agreed upon by the county commissioners or city authorities, if the parties can agree on the terms on which the same may be appropriated, used or occupied, and if unable to agree, then such corporation may appropriate so much as may be necessary without any such agreement, do not authorize a railway company to appropriate a part of a city street; but the sections apply only to road and toll companies occupying the street with the public, in view of Id., § 5719, which provides that where such highways are taken by agreement with the local authorities, the corporation may place gates thereon and receive such tolls as the local authorities consent to, and if appropriated without such agreement, no gates or other obstructions shall be placed on the public roads or tolls charged. *State ex rel. Schade Brewing Co. v. Superior Court* 96

6. EMINENT DOMAIN—LOCATION OF ROUTE — NECESSITY FOR TAKING. Condemnation for a toll logging road cannot be objected to on the ground that no necessity is shown for condemning the particular route surveyed; since the company can make its own selection. *State ex rel. Clark v. Superior Court* 612

7. EMINENT DOMAIN—IMPROVEMENTS—DAMAGES — CHANGE OF GRADE —PERSONS INJURED. Injury inflicted upon property in the neighborhood of a street by a regrade and diverting of travel is *damnum absque injuria*, where the property does not abut on the regraded street, and is not within Const., art. 1, § 16, prohibiting the damaging of property without just compensation; since the injury differs not in kind but only in degree from that suffered by the public generally. *In re Fifth Avenue and Fifth Avenue South* 218

8. EMINENT DOMAIN — COMPENSATION — DAMAGES FROM RAILROAD IN VICINITY. Const. art. 1, § 16, providing that no private property shall be taken or damaged until just compensation has been made, does not entitle an owner of property to damages by reason of the

EMINENT DOMAIN—CONTINUED.

construction of a railroad, where his property does not abut on the right of way, and his damage therefrom, or by the use of streets in the vicinity, is only such as the public in general suffers therefrom. *Clute v. North Yakima & Valley R. Co.*..... 531

9. EMINENT DOMAIN—PROCEEDINGS—REVIEW—CERTIORARI. Error in sustaining a demurrer to a complaint in intervention in condemnation proceedings can only be reviewed by a timely application for a writ of certiorari. *State ex rel. Schmidt v. Superior Court*..... 556

10. EMINENT DOMAIN — PROCEEDINGS—CORPORATIONS—PROOF OF INCORPORATION — EVIDENCE — SUFFICIENCY. In condemnation proceedings, the triplicate copy of the articles of incorporation, held in the office of the company, is sufficient evidence of the incorporation; and a certificate and receipts of the secretary of state showing the filing of the articles and payment of filing and license fees are *prima facie* proof of its existence; Rem. & Bal. Code, § 3682, making a certified copy of the articles *prima facie* proof, not being exclusive. *State ex rel. Clark v. Superior Court*..... 612

EMPLOYEES:

See MASTER AND SERVANT.

ENTRY:

Of public lands, see PUBLIC LANDS, 1, 2.

EQUITY:

See ACCOUNT; CANCELLATION OF INSTRUMENTS; SPECIFIC PERFORMANCE; TRUSTS.

Dismissal in equity as *res judicata*, see JUDGMENT, 3.

Right to jury trial in equitable actions, see JURY.

Subrogation, see MARSHALING ASSETS.

Equitable construction of statutes, see STATUTES, 5.

ESTABLISHMENT:

Of easement, see EASEMENTS.

Right to jury trial in action to establish lost notes, see JURY, 1.

ESTATES:

Decedents' estates, see EXECUTORS AND ADMINISTRATORS.

ESTOPPEL:

By judgment, see JUDGMENT, 2-7.

Of seller on breach of contract, see SALES, 14.

To urge defense against warrants issued against fraudulent claims, see STATES, 3.

To object to tender, see TENDER, 2.

EVIDENCE:

See ASSAULT AND BATTERY; DEPOSITIONS; FALSE PRETENSES; RECEIVING STOLEN GOODS.
Prejudicial nature of comment on by judge, see APPEAL AND ERROR, 21.
Review of rulings as dependent on prejudicial nature of error, see APPEAL AND ERROR, 23-28, 30, 31.
Amount of compensation, see ATTORNEY AND CLIENT, 1.
On note, see BILLS AND NOTES, 4.
For breach of contract, see CONTRACTS, 5.
In criminal prosecutions, see CRIMINAL LAW, 1-5.
Proof of incorporation of company, see EMINENT DOMAIN, 10.
Of fraud, see FRAUD.
Of lesser offense, see HOMICIDE, 3.
Agreement to consider personal earnings of wife separate property, see HUSBAND AND WIFE, 1.
In action for malicious prosecution, see MALICIOUS PROSECUTION, 1, 2.
For injuries to servant in general, see MASTER AND SERVANT.
Custom of miners to inspect place of work, see MASTER AND SERVANT, 14.
Foreclosure, see MECHANICS' LIENS, 3.
Parol evidence to explain stipulation for assessment and damage to property for public improvement, see MUNICIPAL CORPORATIONS, 5.
For personal injuries, see MUNICIPAL CORPORATIONS, 19, 21, 22.
Maintenance of nuisance, see NUISANCE.
Admissibility of evidence under pleading, see PLEADING, 11.
In action to foreclose pledge, see PLEDGES.
Agency, see PRINCIPAL AND AGENT, 7.
Loss of prospective profits, see SALES, 12.
Vacation of tax foreclosure, see TAXATION, 6.
To show constructive trust, see TRUSTS.
For rescission of contract to sell land, see VENDOR AND PURCHASER, 2, 3, 9.
Competency, attendance, credibility and examination of witnesses, see WITNESSES.
For services, see WORK AND LABOR, 1, 4.

1. EVIDENCE—FOREIGN LAWS—PRESUMPTIONS. Laws of another state are presumed to be the same as our own, in the absence of pleading or proof. *Sheppard v. Coeur d'Alene Lumber Co*..... 12

2. EVIDENCE—ACCOUNT BOOKS—ADMISSIBILITY. Account books showing items of sales made are admissible in evidence for the purpose of showing the sales and the net proceeds, even if they were not books of original entry or kept by a competent bookkeeper. *Carlisle Packing Co. v. Deming*..... 455

3. SAME—STATEMENTS FROM BOOKS. A statement drawn from account books is properly admitted in evidence where it was a copy from the books and a witness having personal knowledge of all the

EVIDENCE—CONTINUED.

items testified that the items were correct. *Carlisle Packing Co. v. Deming* 455

4. EVIDENCE—PAROL TO EXPLAIN WRITING—CONTRACTS—CONSTRUCTION—AMBIGUITY. Receipts for advances, given by general agents to an insurance solicitor, are not so clear and certain as to exclude oral evidence of the real intention of the parties as to the solicitor's personal liability thereon, where they provided that the sum with interest shall constitute a lien upon and be repaid from "commissions and percentage allowances accruing to me," and that "any balance outstanding upon the termination of my contract arrangements shall thereupon become immediately due and payable by me in cash;" the solicitor having been arbitrarily discharged without cause assigned within one year, and the percentages accruing for twelve years if policies were kept up that long. *Allenberg v. Wainwright* 234

5. SAME. The same is also true of similar receipts, providing for repayment in cash of the sum received, with interest, on a date left blank, and that the "advance shall constitute a lien upon and be repaid" from the commissions and percentages, as in the other case. *Allenberg v. Wainwright*..... 234

6. EVIDENCE—PAROL TO VARY WRITING—FRAUD. Where a clause in a warranty deed gave the grantee the right to collect all rents due under a certain lease, parol evidence is admissible, as between the original parties, to show that it was inserted on the express stipulation that it should not be treated as a warranty; not to vary the terms of the deed, but to prevent its fraudulent use. *Naden v. Christopher* 413

7. EVIDENCE—WRITTEN EVIDENCE—VARYING BY PAROL—SALES. When a bill of sale of a stallion, taken in part payment of land, was merely collateral to an oral sale of the land, parol evidence is admissible that the stallion was represented to be a pedigreed horse; since the bill of sale did not purport to state all the terms of the contract and does not contradict the same. *Kleeb v. McInturff*..... 508

8. EVIDENCE—CONCLUSION OF WITNESSES—HUSBAND AND WIFE—COMMUNITY OBLIGATIONS. In an action upon the admitted contract of a married man, it is not error to sustain an objection to a question as to whether the defendant had ever incurred an indebtedness for the benefit of the community, as the same is a mere conclusion of the witness. *Peacock v. Ratliff*..... 653

9. EVIDENCE—EXPERTS—OPINIONS. It is not error to allow physicians, who made an examination of plaintiff's condition, to express opinions based upon subjective symptoms, where they were not permitted to testify to any statements made by the plaintiff or as to any of his acts within the control of his will power. *Myhra v. Chicago, Milwaukee & Puget Sound R. Co*..... 1

EVIDENCE—CONTINUED.

10. EVIDENCE—VALUE OF LAND—OPINIONS—WITNESSES—CROSS-EXAMINATION—DISCRETION. Upon an issue as to the value of a lot used for the storage of oil, which business could not be carried on within the fire limits, it is proper on cross-examination to ask a hypothetical question as to the value that would be added by use of the lot under specified conditions for a "profitable oil business," where there was evidence that there was no other location in the city for the carrying on the business "with equal profit;" it being discretionary to allow great latitude on cross-examination of witnesses as to values. *Chicago, Milwaukee & Puget Sound R. Co. v. True*..... 646

11. EVIDENCE—VALUE OF PROPERTY—OFFERS. Upon an issue as to the value of a lot, it is not competent to prove in rebuttal that property in the vicinity had been offered and listed at specified prices. *Chicago, Milwaukee & Puget Sound R. Co. v. True*..... 646

EXAMINATION:

Of expert witnesses, see EVIDENCE, 8-11.
Of witnesses in general, see WITNESSES.

EXCEPTIONS:

Necessity for purpose of review, see APPEAL AND ERROR, 5-7.

EXCESSIVE DAMAGES:

See DAMAGES, 3-6.
Review of second verdict, see APPEAL AND ERROR, 18.
For breach of contract of carriage, see CARRIERS, 4.

EXCHANGE OF PROPERTY:

1. EXCHANGE OF PROPERTY—RESCISSION—NOTICE—RIGHTS OF PARTIES. An action to cancel a deed is notice of plaintiff's election to rescind, and his right to relief is not affected by his subsequent default and forfeiture of the land contract assigned to him by defendant in consideration and exchange for plaintiff's land. *Stelter v. Fowler*.. 345

EXCUSE:

For failure to furnish owner with duplicate statement of materials furnished contractors, see MECHANICS' LIENS, 6.

EXECUTION:

Joinder by husband in note and mortgage as affecting separate nature of property, see HUSBAND AND WIFE, 2.

EXECUTORS AND ADMINISTRATORS:

Orders in probate as final adjudication, see JUDGMENT, 5-7.
Payment of bequests, see WILLS.

EXECUTORS AND ADMINISTRATORS—CONTINUED.

1. EXECUTORS AND ADMINISTRATORS—ACCOUNTING—CHARGES—DEFENDING SUITS. Expenses incurred by the executors of a nonintervention will, who were the chief beneficiaries thereof, in defending a suit for an accounting and partition brought by parties claiming part of the estate, are not properly chargeable against the estate, as they were incurred in their own interests and not as executors. *In re Lotzgesell's Estate* 352

EXEMPTIONS:

In fire insurance policy, see INSURANCE, 3.
Of homestead from prior debts, see PUBLIC LANDS, 3.

EXPENSES:

Allowance of against estate, see EXECUTORS AND ADMINISTRATORS.
Included in proceeding to assess property for local improvement, see MUNICIPAL CORPORATIONS, 8.

EXPERT TESTIMONY:

In civil actions, see EVIDENCE, 9-11.

FALSE PRETENSES:

Statements of codefendant as evidence, see CRIMINAL LAW, 1.
Identity of money taken from accused, see CRIMINAL LAW, 4, 5.

1. FALSE PRETENSES—INDICTMENT AND INFORMATION—VARIANCE. In a prosecution for obtaining money under false pretenses on a certain passenger train, alleged in the information as train No. 258, it is not necessary to identify the train by that number if it is otherwise sufficiently identified. *State v. Brown*..... 293

2. FALSE PRETENSES—EVIDENCE—FALSITY OF STATEMENTS. In a prosecution for obtaining money under false pretenses, it is not necessary for the state to show that all of the representations were false. *State v. Brown*..... 293

FARES:

Refusal of passenger to pay fare, see CARRIERS, 1.
Division of on exchange of transfers, see STREET RAILROADS.

FEES:

Of attorney, see ATTORNEY AND CLIENT.

FELLOW SERVANTS:

See MASTER AND SERVANT, 6-9.

FILING:

Complaint in intervention, see PARTIES.

FINDINGS:

Objections to special findings for purpose of review, see APPEAL AND ERROR, 3.
Review on appeal or writ of error, see APPEAL AND ERROR, 5, 13-15.
Special findings by jury, see TRIAL, 8.

FIRE INSURANCE:

See INSURANCE, 3, 4.

FIXTURES:

Subjection to mechanics' lien, see MECHANICS' LIENS, 1.

FORECLOSURE:

Right of intervener as holder to foreclose upon dismissal of action to cancel note and mortgage, see DISMISSAL AND NONSUIT.
Of lien, see MECHANICS' LIENS.
Of mortgage, see MORTGAGES, 5-8.
Of pledge of corporate stock, see PLEDGES.
Of tax lien, see TAXATION, 3-8.

FORFEITURE:

Of insurance, see INSURANCE, 5.
Payment of bonus on terminating lease as forfeiture, see LANDLORD AND TENANT, 3.
Of contract for sale of land, see VENDOR AND PURCHASER, 5-8, 10.

FORMER ADJUDICATION:

See JUDGMENT, 2-7.

FRANCHISE:

Necessity for franchise to use of street, see EMINENT DOMAIN, 3.
Grant by municipality, see MUNICIPAL CORPORATIONS, 11-16.
Construction of franchise providing for transfers, see STREET RAILROADS.

FRAUD:

See FALSE PRETENSES; SALES, 2, 9.
In sale of corporate stock, see CORPORATIONS, 1.
Purchase of corporate property at tax sale by officers, see CORPORATIONS, 2.
Parol evidence to prevent fraudulent use of deed, see EVIDENCE, 6.
Of agent, see PRINCIPAL AND AGENT, 1, 2.
Warrants issued in payment of fraudulent claims, see STATES.
Vacation of tax foreclosure, see TAXATION, 6.
Sales of realty, see VENDOR AND PURCHASER, 2, 3.

1. FRAUD—EVIDENCE—ADMISSIBILITY. Upon an issue of fraud, tried to the court, latitude should be allowed to show any circumstances from which fraud could be naturally inferred. *Collins v. Hoffman* 278

FRAUD—CONTINUED.

2. FRAUD—EVIDENCE—DEEDS—SUFFICIENCY. The evidence to establish fraud in the insertion of an exception to a covenant against incumbrances must be clear and convincing, and is insufficient where disinterested witnesses who were parties to the transactions testified that it was fully understood and agreed to. *Wakefield v. Fish* 564

FRAUDS, STATUTE OF:

Operation as to oral agreement for trust, see TRUSTS.

1. FRAUDS, STATUTE OF—SALE OF LAND—POSSESSION. Possession does not take an oral sale of land out of the operation of the statute of frauds, where it was not referable to, or in execution of, the contract, but was without the consent of the vendor or after he had repudiated the sale or taken possession himself. *Blakely v. Sumner* 206

2. SAME. Permitting another to cut wood on the land is not the taking of such possession by the vendee as to take an oral sale out of the statute of frauds. *Blakely v. Sumner*..... 206

3. FRAUDS, STATUTE OF—SALE OF GOODS—DELIVERY OF PART—PART PAYMENT. An oral modification of a written contract of sale of goods is not void under the statute of frauds, where, within the exception of Rem. & Bal. Code, § 5290, the purchaser "received and accepted part of the goods" and paid for the same. *Sedro Veneer Co. v. Kwapil*..... 385

GENERAL DENIAL:

See PLEADING, 3, 6, 11.
Pleading and proof in action for services, see WORK AND LABOR, 3.

GOOD FAITH:

Of purchaser, see BILLS AND NOTES, 6-10.

GOVERNMENT:

Violation of constitutional provision guaranteeing republican form of government, see CONSTITUTIONAL LAW, 1.

GOVERNMENTAL POWERS:

Adoption of commission form of government, see MUNICIPAL CORPORATIONS, 2, 3.

GRAND LARCENY:

See LARCENY.

GRANTS:

Implied grant of right of way, see EASEMENTS, 2.

GUARANTY:

See PRINCIPAL AND SURETY.

Violation of constitutional provision guaranteeing republican form of government, see CONSTITUTIONAL LAW, 1.

Right to lien upon correcting defect in compliance with guaranty, see MECHANICS' LIENS, 2.

GUARDIAN AND WARD:

Guardianship of insane persons, see INSANE PERSONS.

HARMLESS ERROR:

See APPEAL AND ERROR, 20-38.

In criminal prosecution, see CRIMINAL LAW, 8, 12.

HIGHWAYS:

1. HIGHWAYS—RIGHTS OF ABUTTER—TRESPASS—INJUNCTION—WATERS AND WATER COURSES. Since the fee of public highways rests in the abutting owner, he may maintain irrigating ditches in the untraveled portion thereof; and his rights will be protected by an injunction against one trespassing thereon by diverting the water by a continuing act resulting in special damage. *Holm v. Montgomery* 398

HOMESTEAD:

Entry on public lands, see PUBLIC LANDS, 1, 2.

Exemption from prior debts, see PUBLIC LANDS, 3.

HOMICIDE:

1. HOMICIDE—TRIAL—VARIANCE. Upon an information for murder by administering poison on the 27th day of August, which caused the deceased to languish and die, it is not a variance to prove the deceased came to her death on the 29th. *State v. Pepoon*..... 635

2. HOMICIDE—DEGREES OF OFFENSE—INSTRUCTIONS. In a prosecution for murder, the right of the jury to determine the degree of the offense given by statute must be based on the evidence, and the court need not instruct thereon, where there was no evidence tending to show the commission of the lesser offenses. *State v. Pepoon*.. 635

3. SAME—EVIDENCE OF LESSER OFFENSES—SUFFICIENCY. In a prosecution for murder in the first degree by poisoning, there is no evidence to warrant instructions upon second degree murder or manslaughter, where it appears that the deceased was of unsound mind and in a highly nervous condition, and either in an attempt to allay such condition or to murder her, the defendants consulted as to the medicines to be given her, and administered the poison; since they were guilty of first degree murder or not at all. *State v. Pepoon* 635

4. HOMICIDE—VERDICT—DEGREES OF OFFENSE. A verdict of guilty as charged is sufficient in a prosecution for murder in the first degree, although the jury is required to find the degree. *State v. Pepoon* 635

HUSBAND AND WIFE:

See MARRIAGE.

Conclusion of witness as to community indebtedness, see EVIDENCE, 8.

1. HUSBAND AND WIFE—WIFE'S SEPARATE PROPERTY—PERSONAL EARNINGS—AGREEMENT WITH HUSBAND. The evidence sufficiently shows an agreement between husband and wife that her personal earnings after marriage should be her separate property, where it appears that the money earned by her in teaching during four years after marriage was applied in completing the purchase and improving property purchased and partly paid for by her before marriage, that the proceeds of such property were thereafter invested and reinvested by her, the husband having nothing to do with the same, under a general understanding between them at all times that it and all her earnings were her separate property. *Dobbins v. Dexter Horton & Co*..... 423

2. SAME—WIFE'S SEPARATE ESTATE—WHAT CONSTITUTES. The fact that the husband joined in a note and mortgage upon real estate purchased and mostly paid for by the wife before marriage does not make the property or the proceeds therefrom community property. *Dobbins v. Dexter Horton & Co*..... 423

3. SAME. Assumption by the wife of mortgage indebtedness upon real estate purchased with her separate funds does not create a community obligation or make the property community property. *Dobbins v. Dexter Horton & Co*..... 423

4. HUSBAND AND WIFE—ACTIONS—INSTRUCTIONS—COMMUNITY DEBT—PRESUMPTIONS—CONTRACT FOR ATTORNEY'S FEES. In an action against a husband and wife for attorney's fees, it is proper to instruct that if the contract was made by the husband and the services rendered the defendants were liable and that the contract was presumptively for the benefit of the community, which presumption would be conclusive if there was no evidence to overcome it. *Peacock v. Ratliff* 653

IDENTITY:

Identification of accused, see CRIMINAL LAW, 3.

Identification of money taken from accused, see CRIMINAL LAW, 4, 5.

IMPEACHMENT:

Of verdict for misconduct of jury, see CRIMINAL LAW, 10.

Of witness, see WITNESSES, 4.

IMPLICATION:

Creation of easement by implication, see EASEMENTS.

IMPROVEMENTS:

Liens, see MECHANICS' LIENS.

Public improvements, see MUNICIPAL CORPORATIONS, 5-10.

INCEST:

1. INCEST—INFORMATION—NEGATIVING DEFENSES—MARRIAGE. Upon a prosecution for incest between first cousins, the fact of a lawful marriage between the parties, if a defense, is to be affirmatively pleaded, and need not be negatived in an information stating every essential element of the crime as defined by Rem. & Bal. Code, § 2455. *State v. Nakashima*..... 686

INCONSISTENT DEFENSES:

See PLEADING, 2.

INDEMNITY:

Contracts of suretyship, see PRINCIPAL AND SURETY.

INDEPENDENT CONTRACTORS:

Negligence of, see NEGLIGENCE.

INDICTMENT AND INFORMATION:

See INCEST; MAYHEM.

Indorsement of name of new witness on information, see CRIMINAL LAW, 6.

Variance between pleading and proof in criminal prosecution, see FALSE PRETENSES; HOMICIDE, 1.

1. INDICTMENT AND INFORMATION—OATH OF PROSECUTING ATTORNEY—AFFIDAVIT. Where an information is duly sworn to in an affidavit by the prosecuting attorney, who takes oath that he is the prosecuting attorney and that the information is true, it is sufficient without reciting that the averments were made on the oath of the prosecuting attorney. *State v. Pepoon*..... 635

2. INDICTMENT AND INFORMATION—DIFFERENT ACTS—TRIAL—ELECTION—RECEIVING STOLEN GOODS. Under an information charging the larceny of fifty bushels of wheat during a certain month, and Rem. & Bal. Code, § 2601, making it larceny to knowingly buy or receive stolen property, it is competent to show that the accused offered one B. and his associates one dollar and a half a sack for all wheat they would take from cars and put in his barn, and thereafter on three different occasions during said month, he paid B. and his associates for wheat stolen by them and put in his barn; and the prosecution need not elect between the different deliveries, since it was all part of one continuous transaction. *State v. Ray*..... 582

3. INDICTMENT AND INFORMATION—SUFFICIENCY—DEMURRER. The sufficiency of an information must be determined on demurrer by what appears on its face, and error in the admission of evidence thereafter does not affect its sufficiency. *State v. Ray*..... 582

4. INDICTMENT AND INFORMATION — DEGREES OF OFFENSE — ASSAULT WITH DEADLY WEAPON. An information charging an assault with a loaded pistol with intent to murder by striking, beating, and wound-

INDICTMENT AND INFORMATION—CONTINUED.

ing, no considerable provocation appearing therefor, supports a conviction of the lesser crime of assault with a deadly weapon with intent to commit bodily injury, no considerable provocation appearing therefor. *State v. Crist*..... 326

INDORSEMENT:

Of bill of exchange or promissory note, see BILLS AND NOTES, 2, 12.
Of name of new witness on information, see CRIMINAL LAW, 6.

INFORMATION:

Criminal accusation, see INDICTMENT AND INFORMATION.

INHERITANCE TAX:

See TAXATION, 9.

INITIATIVE AND REFERENDUM:

See MUNICIPAL CORPORATIONS, 3.

INJUNCTION:

Enjoining trespass against rights of abutting owner in highway, see HIGHWAYS.

1. INJUNCTION—BOND—ACTION—PARTIES ENTITLED TO SUE. An action upon an injunction bond may be maintained by the obligees in their individual capacity, where the injunction was issued in a suit against them as mayor and councilmen of a town to prevent them from entering into a contract on behalf of the town, the town was not made a party to the suit, the injunction ran against them in their individual capacity, and the bond named the obligees as individuals and provided for the payment of damages and costs by them, not by the town. *Sampson v. Woldenberg*..... 483

INSANE PERSONS:

1. INSANE PERSONS—GUARDIANS—APPLICATION—NOTICE. Notice of application to appoint a guardian for an insane person is properly served on her personally and on the person having her in charge at a hospital. *Donaldson v. Winningham*..... 212

2. SAME—NOTICE—TIME—COMPUTATION. A notice of application for the appointment of a guardian of an insane defendant, served February 20, to be heard March 2, is served not less than ten days before the time of hearing, within the rule that the first day be excluded and the last day be included in the computation. *Donaldson v. Winningham*..... 212

3. SAME—SERVICE OF NOTICE—PROCESS. Notice of application for the appointment of a guardian for an insane person may be served by a private person. *Donaldson v. Winningham*..... 212

INSPECTION:

Duty to inspect appliances, see MASTER AND SERVANT, 14.

INSTRUCTIONS:

Errors cured by instructions, see APPEAL AND ERROR, 25.
Review as dependent on prejudicial nature of error, see APPEAL AND ERROR, 32-36, 38.
In criminal prosecutions, see CRIMINAL LAW, 12; HOMICIDE, 2.
To agent, see PRINCIPAL AND AGENT, 6.
In civil actions, see TRIAL.

INSURANCE:

1. INSURANCE—COMMISSIONS—ADVANCES TO AGENT—LIABILITY FOR REPAYMENT. Where such receipts were given with the understanding that the advances were to be repaid only out of commissions and percentages accruing to the solicitor, he cannot be held personally liable thereon, especially where he was arbitrarily discharged without cause assigned before the lapse of the time within which percentages might accrue. *Allenberg v. Wainwright*..... 234

2. SAME—RIGHTS OF COMPANY—BILLS AND NOTES—BONA FIDE HOLDER. In such a case, where suit was brought by the general agents, and the insurance company intervened as the real party plaintiff, the company cannot claim to be a *bona fide* holder of the receipts for value, the intervention appearing to be based upon the theory that acceptance of the receipts by the general agents was the act of the company. *Allenberg v. Wainwright*..... 234

3. INSURANCE—FIRE INSURANCE—POLICY—EXEMPTION. Under a policy of fire insurance exempting the company from liability "for the loss caused directly or indirectly by invasion, insurrection, riot, civil war, or commotion, or military or usurped power, or by order of any civil authority or by theft," the word "indirectly" covers all the causes named, and the company is not liable for a fire resulting from fumigation ordered by the board of health. *Hocking v. British America Assurance Co*..... 73

4. SAME—CAUSE OF FIRE. In such a case, the proximate cause of the fire is the order directing the fumigation, and not the negligence of the officers. *Hocking v. British America Assurance Co*..... 73

5. INSURANCE—LIFE INSURANCE—FORFEITURE—REINSTATEMENT—DISCRETION OF OFFICERS. Under a policy of mutual life insurance providing that a delinquent member may be reinstated in the discretion of the officers upon furnishing satisfactory evidence that he is in good health, the discretion of the officers in refusing a reinstatement is not a judicial discretion reviewable by the courts; and it cannot be said that the officers were not justified in refusing a reinstatement on its appearing that his habit of using liquors was increasing. *Conway v. Minnesota Mutual Life Insurance Co*..... 49

6. SAME—FORFEITURE—WAIVER. Where the secretary of a mutual life insurance company, without authority or notice to the proper officers, accepted a delinquent assessment without a reinstatement

INSURANCE—CONTINUED.

under the terms of the policy, it is not a binding waiver of the right of the company to refuse a reinstatement after another default. *Conway v. Minnesota Mutual Life Insurance Co*..... 49

INTENT:

Of testator, see WILLS.

INTEREST:

See USURY.
On vacation of void tax foreclosure, see TAXATION, 8.
Tender of, see TENDER, 1.
Effect as to credibility of witness, see WITNESSES, 4.

INTERROGATORIES:

To witnesses, see DEPOSITIONS.
To jury, see TRIAL, 8.

INTERVENTION:

Dismissal of appeal for defect of party defendant as dependent on exception in lower court, see APPEAL AND ERROR, 7.
Rights of intervener as holder of mortgage upon dismissal of action for cancellation, see DISMISSAL AND NONSUIT.
In actions in general, see PARTIES.

INTOXICATING LIQUORS:

1. INTOXICATING LIQUORS—SALE WITHOUT LICENSE—STATUTES—REPEAL—CONSTRUCTION. The sale of intoxicating liquors outside of the corporate limits of a city or town, without any license from the county commissioners, is punishable as a misdemeanor, under Rem. & Bal. Code, § 6263, giving the board of county commissioners in each county the sole and exclusive authority to regulate, license, or prohibit such sales, and *Id.*, § 2673, providing that the doing of any act without a license, when one is required by law, shall be a misdemeanor; notwithstanding that Bal. Code, § 7312, making it a misdemeanor to sell intoxicating liquors without a license was repealed by Rem. & Bal. Code, § 2304. *State v. Ray*..... 245

IRRIGATION:

Breach of contract to irrigate lands, see WATERS AND WATER COURSES.

ISSUES:

In civil actions, see PLEADING, 11.

JOINT TORT FEASORS:

Effect of judgment in favor of one joint tort feasor, see MALICIOUS PROSECUTION, 3.

JUDGES:

Comment on evidence as harmless error, see APPEAL AND ERROR, 21.
Right to cancel state oyster deed as conferring judicial powers on land commissioner, see CONSTITUTIONAL LAW, 2.
Misconduct at trial, see TRIAL, 2, 3.

JUDGMENT:

Pleading pendency of action as bar, see ABATEMENT AND REVIVAL, 2.
Review, see APPEAL AND ERROR.
Decision as law of case on second appeal, see APPEAL AND ERROR, 39.
Remand on appeal for reduction, see APPEAL AND ERROR, 41.
Effect of judgment in favor of one joint tort feasor, see MALICIOUS PROSECUTION, 3.
Foreclosure of mortgage, see MORTGAGES, 5.
On pleadings, see PLEADING, 10.
Vacation of void tax foreclosure, see TAXATION, 7.

1. JUDGMENT—DEFAULT—VACATION—MISTAKE. It is not an abuse of discretion to set aside a default judgment for mistake, under Rem. & Bal. Code, § 303, where the defendant had consulted with, and believed in good faith that he had employed, a lawyer to defend the action, although the attorney denied the employment. *Kain v. Sylvester* 151

2. JUDGMENT—CONCLUSIVENESS—JUDGMENT ON DEMURRER. Where a demurrer to the merits of a petition in intervention is sustained and the complaint dismissed, the judgment is final and a bar to any recovery on the grounds stated. *State ex rel. Schmidt v. Superior Court* 556

3. SAME—DISMISSAL IN EQUITY. A decree dismissing a bill in equity without restricting its scope is presumed to be on the merits and is *res judicata*. *State ex rel. Schmidt v. Superior Court*..... 556

4. JUDGMENT—CONCLUSIVENESS—EMINENT DOMAIN—PLEADINGS. The fact that pleadings are not required in condemnation proceedings, does not affect the conclusiveness of a judgment thereon. *State ex rel. Schmidt v. Superior Court*..... 556

5. JUDGMENT—MATTERS DETERMINED—CONSTRUCTION OF WILL. An order in probate for crediting a $1,000 legacy upon a note due from the legatee, entered before the payment of claims or final distribution of the estate, is not an adjudication as to the legal effect of the credit, or a construction of the will, and does not determine the date of the credit for the purpose of computing interest. *Martin v. Barger* 672

6. JUDGMENT—MATTERS DETERMINED—ORDER FOR SALE IN PROBATE. An order in probate for the sale of a note belonging to the estate is not an adjudication of the obligation of the maker thereon. *Martin v. Barger* 672

JUDGMENT—CONTINUED.

7. JUDGMENT — MATTERS DETERMINED — FINAL DISTRIBUTION — CONSTRUCTION OF WILL. A final order of distribution of the estate in pursuance of a last will and testament and in accordance with the terms thereof is not a construction of the will. *Martin v. Barger* 672

JUDICIAL POWER:

Right to cancel state oyster deed as conferring judicial powers on land commissioner, see CONSTITUTIONAL LAW, 2.

JUDICIAL SALES:

Sale of land for nonpayment of taxes, see TAXATION, 3, 4.

JURISDICTION:

Appellate jurisdiction, see APPEAL AND ERROR.
Action against foreign corporation, see CORPORATIONS, 4.
Of state courts in action to recover public lands, see PUBLIC LANDS, 2.

JURY:

Disqualification or misconduct ground for new trial, see CRIMINAL LAW, 10, 11.
Instructions in criminal prosecutions, see CRIMINAL LAW, 12.
Necessity for to levy assessment for local improvement, see MUNICIPAL CORPORATIONS, 6.
Restraining court from summoning grand jury, see PROHIBITION.
Instructions in civil actions, see TRIAL, 4-7.
Verdict in civil actions, see TRIAL, 8.

1. JURY—RIGHT TO JURY TRIAL—EQUITY—LOST NOTES. An action upon lost notes, seeking their establishment and recovery upon indemnifying the defendant against liability on the original notes, is one of equitable cognizance, and defendant is not entitled to a jury trial. *Hart-Parr Co. v. Keeth*..... 464

2. JURY—BREACH OF CONTRACT—ACCOUNTING. An action for breach of a contract to purchase plaintiff's pack of salmon is properly tried to a jury as a law case, and not in equity for an accounting, where the issue was as to the terms of the contract, and an accounting was only incidentally involved to determine the extent of the damages. *Carlisle Packing Co. v. Deming*..... 455

LANDLORD AND TENANT:

Limitation of action for rent, see LIMITATION OF ACTIONS.
Taxation of leasehold, see TAXATION, 1, 2.
Venue of action for rent, see VENUE.

1. LANDLORD AND TENANT—CONTRACT TO LEASE—BREACH—MEASURE OF DAMAGES. Where plaintiff erected a building under an agreement with defendant to lease the same for a period of five years, and defendant refused to take possession because of a statute passed subsequently preventing its use for saloon purposes, the breach of con-

LANDLORD AND TENANT—CONTINUED.

tract is actionable, regardless of whether or not the relation of landlord and tenant was created; and the measure of damages is the difference between the rental value during the term and the rent specified in the contract. *Oldfield v. Angeles Brewing & Malting Co.* 260

2. LANDLORD AND TENANT—NOTICE TO QUIT—REVOCATION—BONUS. After the landlord has given notice terminating a tenancy, whereby a bonus to the tenant attaches, he cannot revoke the notice upon the ground of his own mistake, without the consent of the tenant. *Wisner v. Richards* 429

3. SAME—LEASE—BONUS—FORFEITURES. The exercise of an option to terminate a lease by payment of a bonus presents no features of a forfeiture. *Wisner v. Richards* 429

4. SAME—LEASE—BONUS—TENDER—WAIVER. Where a lease provides for a bonus to the tenant in case the landlord gives notice terminating the term, tender of the bonus need not be given with the notice, and surrender of the premises without demanding the bonus in advance does not waive the tenant's right to recover the bonus. *Wisner v. Richards* 429

5. LANDLORD AND TENANT—RENTS—ACTIONS—STATUTES—TENANT BY SUFFERANCE. Rem. & Bal. Code, § 8805, authorizing an action to recover reasonable rents from a tenant by sufferance, changes the common law rule that such rent is not recoverable, and the action lies against one claiming an adverse title, where the possession was not adverse and hostile in the beginning, but was obtained under an express written contract. *Sheppard v. Coeur d'Alene Lumber Co.* 12

LANDS:

See PUBLIC LANDS.

LARCENY:

See FALSE PRETENSES; RECEIVING STOLEN GOODS.

Evidence of accomplices, see CRIMINAL LAW, 2.

Presumption from possession of stolen property, see CRIMINAL LAW, 12.

Different acts as continuous transaction, see INDICTMENT AND INFORMATION, 2.

1. LARCENY—GRAND LARCENY—CONTINUOUS TRANSACTION. Where the purchase of stolen property on three different occasions was pursuant to one offer and all part of one transaction, it amounts to grand larceny, under Rem. & Bal. Code, § 2605, if the total value was over twenty-five dollars, notwithstanding there might have been a conviction of petit larceny for any one of the three acts. *State v. Ray* 582

LAW OF THE CASE:

See APPEAL AND ERROR, 39.
Applying rule of *stare decisis* in construing constitution, see COURTS.

LAWS:

Presumptions as to, see EVIDENCE, 1.

LEASES:

See LANDLORD AND TENANT.
Of telegraph wire, see TELEGRAPHS AND TELEPHONES.

LEAVE OF COURT:

Filing complaint in intervention, see PARTIES.

LEGACIES:

See WILLS.

LEGISLATIVE POWER:

See MUNICIPAL CORPORATIONS, 2.

LETTERS:

As privileged communications, see WITNESSES, 3.

LEVY:

Assessment for local improvement, see MUNICIPAL CORPORATIONS, 6.

LIBEL AND SLANDER:

1. LIBEL AND SLANDER—DEFENSES—VIOLATION OF STATUTE. An osteopath cannot recover damages for a libel characterizing him as a quack and charlatan, where it appears from his testimony that he was practicing osteopathy in violation of the laws of the state making it a misdemeanor to maintain an office with his name and the word "Doctor" in public view. *Lathrop v. Sundberg*..... 136

2. SAME—RIGHT TO MAINTAIN ACTION. One illegally advertising as a doctor cannot maintain an action for libel on the theory that he had a common law right to practice osteopathy. *Lathrop v. Sundberg* 136

3. SAME—COMPLAINT—ISSUES AND PROOF. Under a complaint for libel in charging an osteopath with being a quack and a charlatan, it cannot be claimed that the publication was of and concerning osteopathy as a profession, and that the damage resulted to the plaintiff as a member of that profession. *Lathrop v. Sundberg*..... 136

LICENSES:

For sale of intoxicating liquors, see INTOXICATING LIQUORS.

LIENS:

See MECHANICS' LIENS.
Mortgage, see MORTGAGES.
Tax lien, see TAXATION.

LIFE INSURANCE:

See INSURANCE, 5, 6.

LIMITATION OF ACTIONS:

Time for taking appeal, see APPEAL AND ERROR, 8.
Demurrer on ground of bar of statute, see PLEADING, 5.

1. LIMITATION OF ACTIONS—RENTS—LANDLORD AND TENANT. An action for rent is within Rem. & Bal. Code, § 157, subd. 3, providing a limitation of six years for rents and profits for the use and occupation of real estate. *Peterson v. Pantheon Lumber Co*..... 189

LIQUIDATED DAMAGES:

See DAMAGES, 1.

LIS PENDENS:

Pendency of other action ground for abatement, see ABATEMENT AND REVIVAL.

LOGS AND LOGGING:

Condemnation for toll logging road, see EMINENT DOMAIN, 1, 2, 6.

LOST INSTRUMENTS:

Right to jury trial, see JURY, 1.

MACHINERY:

Liability of employer for defects or failure to guard, see MASTER AND SERVANT, 5, 12, 13, 20.

MAGAZINES:

In jury room, see CRIMINAL LAW, 11.

MAIMING:

See MAYHEM.

MALICE:

See MALICIOUS PROSECUTION.

MALICIOUS PROSECUTION:

1. SAME—PROBABLE CAUSE—EVIDENCE—ADMISSIBILITY. In an action for malicious prosecution, the admission in evidence of the magistrate's reasons for discharging the plaintiffs is prejudicial error, where want of probable cause is not conceded. *Aldrich v. Inland Empire Telephone & Telegraph Co*..... 173

2. MALICIOUS PROSECUTION—MALICE — EVIDENCE — SUFFICIENCY. In actions against a corporation and its president for malicious prosecution, a finding of malice on the part of the corporation, although none was found against the president, is warranted, where it appears that he did not become president until long after the occur-

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rence, other officers did not report all the facts to him, and he fully reported to the prosecuting attorney all the facts within his knowledge. *Aldrich v. Inland Empire Telephone & Telegraph Co*..... 173

3. SAME—TRIAL—JUDGMENT—JOINT TORT FEASORS. In actions for malicious prosecution against a corporation and its president, a verdict and judgment for the president does not exonerate the corporation where the prosecution was directed by the trustees. *Aldrich v. Inland Empire Telephone & Telegraph Co*..... 173

4. SAME—DAMAGES—COSTS OF DEFENSES. In an action for malicious prosecution, the cost of a transcript, paid after discharge, cannot be recovered as a necessary expense incurred in making plaintiff's defense. *Aldrich v. Inland Empire Telephone & Telegraph Co*... 173

MANDAMUS:

1. MANDAMUS—STATE WARRANTS—PARTIAL VALIDITY—RELIEF. Upon mandamus to compel payment of a state warrant on claims part of which were illegal, the supreme court will not direct payment to the extent of the valid claims, the state treasurer not having refused to honor a proper warrant therefor. *State ex rel. Olympia Nat. Bank v. Lewis*..... 266

MANDATE:

To lower court on decision on appeal, see APPEAL AND ERROR, 40-44.

MARRIAGE:

See HUSBAND AND WIFE.

Negativing defense in information, see INCEST.

1. MARRIAGE—RESTRICTIONS—STATUTES—REPEAL. Rem. & Bal. Code, § 7151, prohibiting marriage between persons nearer of kin than second cousins, was not impliedly repealed by Rem. & Bal. Code, § 2455, defining incest, or by Rem. & Bal. Code, §§ 7152, 7153, 7164, 7165, relating to and prohibiting marriages in certain other specified cases. *State v. Nakashima*..... 686

MARSHALING ASSETS:

1. MARSHALING ASSETS — SUBROGATION — APPEAL — DECISION—QUESTIONS NOT PRESENTED BELOW. Where the consideration for a note has failed, but the same is in the hands of a holder in due course as collateral security, the supreme court will not direct that the holder first exhaust its other security and order a subrogation, where such issue was not tried out in the court below and the rights of a receiver and other creditors similarly situated might be affected. *Moyses v. Bell*..... 534

MASTER AND SERVANT:

Inadequate or excessive damages for injuries to servant, see DAMAGES, 3, 5, 6.

Liens for labor and materials, see MECHANICS' LIENS.

MASTER AND SERVANT—CONTINUED.

Negligence of independent contractor, see NEGLIGENCE.
Conditions on lease of wire as to operators employed by lessee, see TELEGRAPHS AND TELEPHONES.
Recovery for services under implied contracts, see WORK AND LABOR.

1. MASTER AND SERVANT—EMPLOYMENT—CAUSING DISCHARGE—LIABILITY—TELEGRAPHS. A telegraph company leasing one of its lines on the condition that the lessee should employ operators satisfactory to it is not liable to an operator for causing his discharge, regardless of improper motives; since the company had the right to say who should use its property. *O'Brien v. Western Union Telegraph Co.* 598

2. SAME—BLACKLISTING. Rem. & Bal. Code, § 6565, against blacklisting is not violated by objection to the employment of a person, where such person is required to use the objector's property. *O'Brien v. Western Union Telegraph Co* 598

3. MASTER AND SERVANT—SAFE PLACE TO WORK—INSTRUCTIONS. It is not reversible error to instruct that the master owes the duty to furnish his servant with a safe place to work, instead of instructing that he must exercise ordinary care in furnishing a safe place, where the instruction is qualified by another to the effect that the master is not an insurer of the safety of the place, but that the law imposes upon him the duty of exercising a reasonable degree of care in the furnishing of a safe place. *Jacobsen v. Rothschild* 127

4. MASTER AND SERVANT—SAFE PLACE. In the taking down of an exhibition building with a view of preserving its parts to be again erected for use, the master owes the duty of furnishing a "safe place" in which to work. *Etheridge v. Gordon Construction Co.* 256

5. MASTER AND SERVANT—DEFECTIVE APPLIANCES—EVIDENCE—SUFFICIENCY. Where an injury resulted to a stevedore through the inability of the winch driver to make the winch obey the lever, testimony by the winch driver that he told the foreman that the winch was defective, whereupon he was directed to do the best he could with it, is sufficient to warrant the submission to the jury of an issue as to the defective condition of the winch. *Jacobsen v. Rothschild* 127

6. MASTER AND SERVANT — FELLOW SERVANTS — GIVING OF SIGNALS. The feeder of a brick machine, whose duty it was to signal the pressman for starting the press, is not a fellow servant of a coemployee whose safety depended upon the giving of the proper signals, and the same is a nondelegable duty of the master. *Grosjean v. Denny-Renton Clay & Coal Co* 196

7. MASTER AND SERVANT — FELLOW SERVANTS — SIGNALS — PRESUMPTIONS—EVIDENCE—SUFFICIENCY. Where a winch tender testified that he "let go" a sling load of ties in obedience to an order from the foreman in charge of the work, the presumption that the signal was

MASTER AND SERVANT—CONTINUED.

given by the hatch tender is overcome, and the finding of the jury to that effect controls, although the foreman denied that he gave the signal. *Jacobsen v. Rothschild*..... 127

8. SAME—FELLOW SERVANTS—WHO ARE—SIGNALMAN AND FOREMAN. Where workmen are compelled to depend upon signals, the master's duty of conveying the signals is nondelegable, so that a hatch tender giving signals would not be a fellow servant of the foreman of the crew. *Jacobsen v. Rothschild*..... 127

9. SAME—FELLOW SERVANTS. A general foreman in the work of taking down a building who ordered the removal of a purlin is not a fellow servant of a workman carrying out the order. *Etheridge v. Gordon Construction Co*..... 256

10. SAME—COAL MINING—STATUTES—APPLICATION. Rem. & Bal. Code, § 7394, providing that the owner shall send down into the mine to be delivered at the working place sufficient timbers and props, in the act on the subject of "coal mines," relating particularly to the extra hazards of that business, has no application to prospecting tunnels in which no coal was being mined and which was not a part of a coal mine; the language indicating that the legislature had in mind the extra hazards peculiar to coal mining. *Hemmingson v. Carbon Hill Coal Co*..... 28

11. MASTER AND SERVANT—ASSUMPTION OF RISKS—DANGEROUS METHODS. Where a laborer, instead of having himself let down an eighteen foot shaft by the windlass, let the bucket down and unwound the rope to the staple on the windlass and swung himself over the shaft intending to slide down the rope, whereupon the staple pulled out, he assumes the risk, as a matter of law, where he well knew the danger of adopting that method of entering the shaft. *Brekick v. Welch*..... 623

12. MASTER AND SERVANT—DEFECTIVE CARS—ASSUMPTION OF RISKS—PROMISE TO REPAIR. There is a sufficient complaint and promise to remedy a defect to relieve a railroad brakeman from the assumption of risks in attempting to give signals from the end doors of a box car, which had neither platforms nor brakes, and the side doors of which were nailed up, where it was obvious that it was not a safe place for giving signals, and the brakeman asked for the removal of the boards on the side doors in order to give "a chance to stay there and give signals and also get out if necessary," whereupon the master's terminal engineer replied that the use of the car was only temporary, that they would hold out the first small box car and "we will fix it up." *Myhra v. Chicago, Milwaukee & Puget Sound R. Co.*..... 1

13. SAME—AUTHORITY TO MAKE PROMISE—VICE PRINCIPAL. A railroad employee styled a terminal engineer, having charge of material yards, the loading of cars, and the direction of engineers and con-

MASTER AND SERVANT—CONTINUED.

ductors, and regarded by the crew as the officer in charge of the train, is a vice principal and has authority to promise to remedy a defect in a car on a complaint made by a brakeman; especially where the car was furnished for particular service in construction work on application made to him by the conductor. *Myhra v. Chicago, Milwaukee & Puget Sound R. Co*..... 1

14. MASTER AND SERVANT—SAFE PLACE—ASSUMPTION OF RISKS—INSPECTION—EVIDENCE OF CUSTOM. Where the character of tunnel work is constantly changing, in the absence of rules promulgated by the master or fixed by law, evidence is admissible of a custom of miners engaged in timbering to test and inspect the roof for themselves, regardless of a test made by the tunnel boss some time before the accident. *Hemmingson v. Carbon Hill Coal Co*..... 28

15. MASTER AND SERVANT—DEATH OF EMPLOYEE—PROXIMATE CAUSE—QUESTION FOR JURY. Where a structural iron worker, standing on a fresh or green wall at the top of a building, had hold of a channel beam for the purpose of assisting to "drift" it into place, and by reason of an error in communicating or obeying a signal to lower the beam, the engineman swung the beam away from the wall, and the iron worker was pulled out before he could let go, and fell, some of the freshly laid bricks giving way under his feet, the proximate cause of the accident was the error in giving or obeying the signal, and the extent to which the insecure wall contributed thereto was a question for the jury. *Cole v. Gerrick*..... 226

16. SAME—CONCURRING CAUSE—LIABILITY. Where the master is liable for the proximate cause, or one of the causes of the accident, it is immaterial that he was not responsible for a contributing cause. *Cole v. Gerrick*..... 226

17. MASTER AND SERVANT—NEGLIGENT SIGNALS—VICE PRINCIPALS. A master is liable for the death of a structural iron worker, who fell through the negligence of coemployees in communicating or obeying a signal to the engineman at a hoisting derrick. *Cole v. Gerrick* 226

18. SAME—CONTRIBUTORY NEGLIGENCE—UNSAFE METHODS. A structural iron worker is not guilty of contributory negligence as a matter of law, in going upon a fresh or green wall to assist in "drifting" a beam into place, where he was not warned of the condition of the wall, it was not unusual to go upon the walls, and that was the best position for him to take to render such assistance, although there were other positions he might have taken. *Cole v. Gerrick* 226

19. MASTER AND SERVANT—INJURY TO SERVANT—PLEADING—COMPLAINT—SUFFICIENCY—CONTRIBUTORY NEGLIGENCE. A complaint states a cause of action where it alleges that one employed as a common laborer was ordered to go under and lift on the end of a heavy derrick, and upon his doing so, his employers negligently caused the same to fall upon and injure him; contributory negligence being

MASTER AND SERVANT—CONTINUED.

a matter of defense, and the allegations in no way implicating the plaintiff. *Hansen v. Rounds*..... 247

20. SAME—DEFECTIVE CARS—NEGLIGENCE—QUESTION FOR JURY. A box car without platforms or brakes, with the side doors nailed up, cannot be said, as a matter of law, to be reasonably safe for construction work requiring the giving of signals from the end doors, where cabooses with end platforms and railings or cars with side doors and ladders are commonly used in such work. *Myhra v. Chicago, Milwaukee & Puget Sound R. Co*..... 1

21. MASTER AND SERVANT—SAFE PLACE — TUNNELS — ASSUMPTION OF RISKS—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. The questions of contributory negligence and assumption of risks by a miner injured through the fall of rock while assisting to timber a tunnel are for the jury, where the foreman inspected the place and ordered the plaintiff to work there, and there was some evidence that it was customary for miners engaged in timbering to sound the rock and make some inspection for themselves. *Hemmingson v. Carbon Hill Coal Co.* 28

22. MASTER AND SERVANT—ASSUMPTION OF RISKS—QUESTION FOR JURY. A miner working in a tunnel does not assume the risks where, upon discovering a crack in the roof, he called the same to the attention of the owner, who made an inspection and pronounced it safe, directing the miner to work there the rest of the day, after which props would be put in. *Beseloff v. Strandberg*..... 36

23. SAME—PROMISE TO REPAIR. In such a case, the promise to put in props after the miner had quit for the day, was the inducement for the miner's continuance of work, and is not open to the objection that the promise and inducement do not concur. *Beseloff v. Strandberg* 36

24. SAME—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. A brakeman, compelled to give a signal from the end door of a box car without any platforms, is not guilty of contributory negligence, as a matter of law, in stepping upon the coupler instead of the grab irons, which would have been better and safer, where he and others testified that the coupler gave a firmer and safer foothold. *Myhra v. Chicago, Milwaukee & Puget Sound R. Co*..... 1

25. SAME. In such a case, it cannot be said that he should have given signals from the other end of the car, where there was evidence that that would have been more dangerous, nor from the side windows, when it was doubtful if they could have been opened. *Myhra v. Chicago, Milwaukee & Puget Sound R. Co*..... 1

26. MASTER AND SERVANT—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—SIGNALS AND WARNING—QUESTION FOR JURY. The negligence of the master and the contributory negligence of a swamper in a logging camp, who was struck while cutting a tree in the bight of the

MASTER AND SERVANT—CONTINUED.

cable, is for the jury, where it was customary, in hauling in the logs to the landing, for the signalman to give notice by a blast of a whistle, thereby enabling the swamper to get out of the way of the cable, and instead of doing so, he gave the engineer a signal by hand. *Crawo v. Phoenix Logging Co*..... 154

27. SAME—SAFE PLACE—NEGLIGENCE—ERRONEOUS SIGNALS—CONTRIBUTORY NEGLIGENCE—QUESTIONS FOR JURY. The negligence of the owner of a brick machine, and the contributory negligence of an employee whose duty it was to remove dry clay from the top of the press, while coemployees controlled the machinery, is for the jury, where it appears that the employee was ordered and it was customary for him to put his hands in the press relying upon notice to the feeder, that the pressman never started the press until signaled to do so by the feeder except on starting up in the morning, that the pressman started the press in response to a wrong signal given by the feeder while the employee's hands were in the press, cutting off his hands, and that a stick to be first inserted in the press in such a case for safety was not used, and that the employee had worked but a few months and did not know anything about such stick. *Grosjean v. Denny-Renton Clay & Coal Co*..... 196

28. MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE—ASSUMPTION OF RISKS—QUESTION FOR JURY. Whether a workman, engaged in taking down a building, was guilty of contributory negligence or assumed the risks in removing a purlin supporting the trusses, is for the jury, where there was evidence that he did so upon the order of the general foreman who was following the general plan adopted by the master, although he had been warned the day before by another workman or foreman that it was extremely dangerous to remove the purlin. *Etheridge v. Gordon Construction Co*..... 256

29. SAME—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS. Upon an issue as to contributory negligence of a workman engaged in taking down a building, after warning by a fellow workman of the dangerous nature of plaintiff's act, an instruction that there could be no recovery if he was warned by a fellow servant having greater experience than the plaintiff, is as favorable as defendants can ask. *Etheridge v. Gordon Construction Co*..... 256

MATERIALS:

Right to lien for, see MECHANICS' LIENS.

MATURITY:

Option to hasten maturity of note, see BILLS AND NOTES, 11.

Entry of decree for part of mortgage debt maturing since commencement of action, see MORTGAGES, 5.

MAYHEM:

1. MAYHEM—INFORMATION—SUFFICIENCY. An information, practically in the language of the statute, charging the accused with biting off the end of the nose of a person with intent to disfigure him, sufficiently charges maiming, as defined by Rem. & Bal. Code, § 2407. *State v. Catsampas* 70

MECHANICS' LIENS:

1. MECHANICS' LIENS—FIXTURES—HEATING PLANT. A boiler, radiators, and other appliances, attached to a hot water heating system, furnished with pipes, etc., under a building contract, are fixtures and subject to a mechanics' lien as part of the building, although they could be detached without damage, it being conceded that the pipes were fixtures and that some of the articles were designed for use in the particular building. *American Radiator Co. v. Pendleton*... 56

2. MECHANICS' LIENS — CONTRACT — ORDER — GUARANTY — BREACH. Where plaintiff failed to install heating apparatus in compliance with its guaranty, it cannot claim a mechanics' lien for a pump necessarily installed to correct the defect, ordered by the defendant after conferring on the matter, although nothing was said about who was to pay for the pump, it not being claimed that the pump was not a reasonable and the cheapest remedy for the defect. *Yundt v. Schultz-Degginger Co.* 308

3. MECHANICS' LIENS—MATERIALMAN—CONTRACT—EVIDENCE — SUFFICIENCY. A corporation did not furnish material on the credit of the owners of the property, where it appears that it furnished the same under an agreement with contractors, and the alleged substitution of the credit of the owners was by an agent without authority, and at a later time than alleged, it being after part of the materials were furnished. *Finlay v. Tagholm*..... 341

4. SAME—WHO IS MATERIALMAN—SUBCONTRACTORS. A corporation furnishing to contractors the sashes, doors and glass for a building is not a subcontractor or entitled to file a lien as such. *Finlay v. Tagholm* 341

5. SAME—NOTICE—DUPLICATE STATEMENTS. Under Rem. & Bal. Code, § 1133, requiring duplicate statements of material furnished to contractors to be given to the owner at the time the materials are delivered, one duplicate statement, given when the last of the materials are furnished, is insufficient. *Finlay v. Tagholm*..... 341

6. SAME—DUPLICATE STATEMENT—EXCUSE. The duplicate statements to the owners of materials furnished to contractors, required by Rem. & Bal. Code, § 1133, to be given when the materials are furnished, is not excused by the fact that the owner had notice that they were being furnished, said section providing that no materialman's lien shall be filed unless the provisions of the statute are complied with. *Finlay v. Tagholm*..... 341

METHOD OF WORK:

Adopting dangerous method, see MASTER AND SERVANT, 11.

MINES AND MINERALS:

Employees in mines, see MASTER AND SERVANT, 10, 14, 21.

MISCONDUCT:

Of counsel in making opening statement, see CRIMINAL LAW, 8.
Of jury in criminal prosecution, see CRIMINAL LAW, 10, 11.
Of judge or counsel in trial of civil action, see TRIAL, 1-3.

MISREPRESENTATION:

See FALSE PRETENSES.
Inducing sale, see SALES, 2, 9.

MISTAKE:

As ground for cancellation of option, see CANCELLATION OF INSTRUMENTS.
As ground for vacation of default judgment, see JUDGMENT, 1.

MODIFICATION:

Of judgment or order on appeal, see APPEAL AND ERROR, 41.
Of contract, see CONTRACTS, 1.

MONEY:

Identity of money taken from accused, see CRIMINAL LAW, 4, 5.
Obtaining by false pretenses, see FALSE PRETENSES.

MOOT QUESTION:

Review on appeal, see APPEAL AND ERROR, 1.

MORTGAGES:

Decision granting priority of right to tenant in common to redeem from foreclosure sale as cessation of controversy, see APPEAL AND ERROR, 1.
Dismissal of action to cancel note and mortgage as affecting intervener's rights to foreclose, see DISMISSAL AND NONSUIT.
Separate property of married woman, see HUSBAND AND WIFE, 2.
Tender of interest on mortgage note, see TENDER, 1.
Discounting of note and mortgage as usurious transaction, see USURY.

1. MORTGAGES—PRIORITY—RECORD—BONA FIDE PURCHASERS—PREEXISTING DEBT. As between real estate mortgages given as security for preexisting debts, the one first executed and delivered takes priority, although the other was first recorded; a mortgagee for a preexisting debt not being a *bona fide* purchaser, within Rem. & Bal. Code, § 8781, providing that a recorded mortgage shall be valid as against *bona fide* purchasers from the date of recording. *McDonald & Co. v. Johns*..... 521

MORTGAGES—CONTINUED.

2. MORTGAGES—BONA FIDES—RECORD TITLE—NOTICE. A mortgagee is not charged with the mortgagor's notice of an outstanding equity in a third person, where there was nothing to show that he did not rely on the record title. *Wakefield v. Fish*..... 564

3. MORTGAGES—RECORD—PRIORITIES. A purchase money mortgage does not, under our recording acts, take priority over others unless they concur in time or the priorities are controlled by contract or equities between the several mortgagees. *Wakefield v. Fish*.... 564

4. MORTGAGES — APPLICATION OF PROCEEDS — EQUITIES — SUPERIORITY. One having notice that a certain mortgage was to be made to raise money to satisfy his undisclosed equity in the property, cannot charge the mortgagee with the application of the proceeds where he failed to give the mortgagee direct notice of his claim thereto, even if the mortgagee had notice of the mortgagor's agreement to so apply the proceeds. *Wakefield v. Fish*..... 564

5. MORTGAGES—FORECLOSURE—AMOUNTS— MATURITY—PLEADING—SUPPLEMENTAL COMPLAINT. Upon the foreclosure of mortgage notes, part of which were not due, judgment may be entered for the amount due at the date of the entry of the decree, without the filing of any supplemental complaint as to an installment falling due since the action was commenced, where the foundation of the judgment was laid in the complaint and the notes were introduced in evidence. *Naden v. Christopher*..... 413

6. MORTGAGES—FORECLOSURE—AMOUNTS MATURING — APPLICATION OF PROCEEDS, Upon the foreclosure of mortgage notes, part of which were not due, Rem. & Bal. Code, § 1128, authorizes the application of the proceeds of the sale, where the land cannot be sold in parcels, first to the sum due and costs, and the next to the residue not due but secured by the mortgage. *Naden v. Christopher*..... 413

7. SAME—DECREE—SALE IN PARCELS. In such case, application to ascertain if the property can be sold in parcels follows the judgment, under Rem. & Bal. Code, § 1127. *Naden v. Christopher*..... 413

8. MORTGAGES — FORECLOSURE — SUCCESSIVE FORECLOSURES — JUNIOR MORTGAGES. Where a first mortgage had been foreclosed, establishing the priorities and the amount of the respective debts, without making junior mortgagees parties to the suit, it is proper to dismiss a subsequent action to foreclose the junior mortgage; since the right of redemption secures all the rights they would have by their foreclosure. *Wakefield v. Fish*..... 564

9. MORTGAGES—REDEMPTION—RIGHT TO REDEEM—TENANTS IN COMMON—PRIORITY. Tenants in common, who joined in a mortgage, are equally entitled to redeem from the foreclosure sale, and redemption by one inures to the benefit of the other, subject to reimbursement, and their priority in demanding redemption from the

MORTGAGES—CONTINUED.

sheriff is immaterial; hence neither can maintain an action to restrain the issuance of a certificate to the other. *McSorley v. Lindsay* 203

MOTIONS:

Relating to pleadings, see PLEADING, 8.

MUNICIPAL CORPORATIONS:

Amendment of ordinance pending appeal as cessation of controversy, see APPEAL AND ERROR, 2.

Creation of commission form of government as violating constitutional guarantee of republican form of government, see CONSTITUTIONAL LAW, 1.

Condemnation of city street for use of railroad, see EMINENT DOMAIN, 3-5.

Right of owner to damages where property does not abut on improvement or right of way, see EMINENT DOMAIN, 7, 8.

Repeal of laws relating to legislative powers of cities, see STATUTES, 4.

Street railroads, see STREET RAILROADS.

1. MUNICIPAL CORPORATIONS—CHARTERS—STATUTES—CONFLICT. Charters adopted by cities of the first class are subject to and controlled by general laws, and this is the only constitutional restriction therein. *Walker v. Spokane*..... 312

2. MUNICIPAL CORPORATIONS — CHARTERS — GOVERNMENTAL POWERS — COMMISSION FORM OF GOVERNMENT—STATUTES—CONSTRUCTION. Under Rem. & Bal. Code, § 7517, providing that the legislative powers of a city of the first class shall be vested in a mayor and city council with such duties as may be prescribed in its charter, and Id., § 7518, providing that such city adopting a charter shall have all the powers now or hereafter conferred upon cities and towns by the laws of the state, and such as are usually exercised by municipal corporations, and Id., § 7504, providing that the voters may amend the charter in any matter within the realm of local affairs or municipal business, a city may adopt the commission form of government vesting all legislative and executive power in five commissioners who shall constitute the council, one of whom shall be mayor, each to be in charge of an independent department; since the same does not go beyond the realms of local affairs and municipal business. *Walker v. Spokane*..... 312

3. MUNICIPAL CORPORATIONS—CHARTERS—COMMISSION FORM OF GOVERNMENT—INITIATIVE AND REFERENDUM. The only limitation on the powers of a city government to enact laws through the medium of a charter is that they shall be in accordance with general laws, and a charter establishing the commission form of government, with the initiative, referendum, and recall does not violate any statutory law. *Walker v. Spokane*.....312

MUNICIPAL CORPORATIONS—CONTINUED.

4. MUNICIPAL CORPORATIONS—OFFICERS—MAYOR—POWERS — STATUTES. Rem. & Bal. Code, § 7517, providing that the legislative powers of cities of the first class shall be vested in a mayor and city council, without limiting or specifying his duties as an executive officer, does not imply that the mayor must be an officer possessed of the distinguishing characteristics of a mayor, or that he shall be an executive officer, since other mandatory provisions of the statutes are to the effect that he shall perform the duties prescribed by the charter. *Walker v. Spokane*..... 312

5. MUNICIPAL CORPORATIONS—IMPROVEMENTS— ASSESSMENTS — STIPULATIONS—AMBIGUITY—PAROL EVIDENCE TO EXPLAIN. Where petitioners for a change of grade stipulated in their petition that property damaged shall not be assessed in excess of six dollars per front foot and reserved the right to recover damages, a stipulation entered into at the trial, whereby it was agreed that their property was damaged in the sum of ten dollars and that the same shall be liable to assessment for the improvement, is based upon a new consideration not contemplated when the petition was filed, and admits of assessment in excess of six dollars per front foot; and the same is so clear and unambiguous as not to admit of explanation by parol evidence. *Seattle Transfer Co. v. Seattle*..... 269

6. MUNICIPAL CORPORATIONS—IMPROVEMENTS— ASSESSMENTS — PROCEDURE—JURY. Under const., art. 7, § 9, providing that the legislature may vest the municipal authorities with power to make local improvements by special assessment or taxation, it is not necessary that a jury be impaneled in order to levy the assessment, and Rem. & Bal. Code, §§ 7768, 7790 *et seq.*, are not unconstitutional in authorizing assessments by commissioners, subject to review by the courts, without any jury trial. *In re Jackson Street*..... 432

7. SAME—OBJECTIONS—WAIVER. Owners petitioning for a street of a certain width cannot object to confirmation of the assessment on the ground that the width was unnecessary. *In re Jackson Street* 432

8. SAME—ASSESSMENTS—EXPENSES. An assessment for local improvements may include the costs of the city attorney, expenses of the city engineer, and of the emiennt domain commissioners, incurred in the proceeding. *In re Jackson Street*..... 432

9. SAME—BENEFITS — BOUNDARIES OF DISTRICT — REVIEW. The deci sion of the eminent domain commissioners determining the boundaries of a local improvement district to be assessed for benefits will not be disturbed on appeal because of differences of opinion as to the propriety thereof. *In re Jackson Street*..... 432

10. SAME—ASSESSMENTS — AMOUNT — REVIEW. An apportionment of benefits by the eminent domain commissioners will not be disturbed on appeal on the ground that it was not according to the benefits, where there was a diversity of opinion between the wit-

MUNICIPAL CORPORATIONS—CONTINUED.

nesses and the evidence was not sufficient to overcome the report. *In re Jackson Street*..... 432

11. MUNICIPAL CORPORATIONS — STREETS — RAILROADS — OBSTRUCTIONS AND USE—POWER OF CITY—STATUTES—CONSTRUCTION. The right to occupy a public street to the exclusion of the public cannot be granted to a railroad company by a city, under Rem. & Bal. Code, § 7507, providing that the city may authorize the locating and construction of any railroad in any street and prescribe the terms; nor under Id., § 7479 granting practically the same powers to cities of the first class by an act entitled an act granting "additional authority" as to the location of railroads, in, along, over or across any street, which act regulates the granting of franchises for such use of the streets without giving any material additional powers. *State ex rel. Schade Brewing Co. v. Superior Court*..... 96

12. SAME—STREETS — FRANCHISES — POWER TO GRANT — VACATION OF STREETS. A franchise to a railroad company to occupy a part of a public street to the exclusion of the public cannot be upheld under the city's power to vacate the street, when it was not exercised in the manner prescribed by Rem. & Bal. Code, §§ 7840-7843, for such vacations. *State ex rel. Schade Brewing Co. v. Superior Court*.. 96

13. SAME. A city of the first class is not authorized to grant a franchise to a railroad company to encroach upon or use a material portion of a city street to the exclusion of the public therefrom. *State ex rel. Schade Brewing Co. v. Superior Court*..... 96

14. MUNICIPAL CORPORATIONS—STREETS—FRANCHISES — STATUTORY AUTHORITY. Power to authorize the location of a railroad "in" a street does not imply or mean power to grant an exclusive right to use the street. *State ex rel. Schade Brewing Co. v. Superior Court*..... 96

15. SAME. Power to alter streets, change grades, and exercise general control over streets, does not include the power to surrender the use of any part of the surface thereof. *State ex rel. Schade Brewing Co. v. Superior Court*..... 96

16. SAME. Power to grant to a railroad company the right to tunnel under, and use land under the surface of the street, does not include the right to grant the exclusive use of a part of a street for the purpose of descending to the grade under the street. *State ex rel. Schade Brewing Co. v. Superior Court*..... 96

17. MUNICIPAL CORPORATIONS—TORTS—LIABILITY — STREETS — ACTS OF OFFICERS—STREET SUPERINTENDENT. The duty of a city to keep its streets in repair not being a governmental but a ministerial duty, liability for breach is not limited to defects or obstructions, but the city is liable to a pedestrian negligently run down and injured by its superintendent of streets while driving an automobile in the performance of his duty. *Hewitt v. Seattle*..... 377

MUNICIPAL CORPORATIONS—CONTINUED.

18. MUNICIPAL CORPORATIONS—NUISANCES — ABATEMENT — DAMAGES—THREATENED ACTION. Damages cannot be recovered from a city by one who was coerced to cease the operation of charcoal kilns by notices from the health department to abate the alleged nuisance or the kilns would be destroyed; since he was under no obligation to cease operations unless his acts were a nuisance. *Richards v. Seattle* 684

19. MUNICIPAL CORPORATIONS—STREETS—RUNAWAY TEAMS—INJURY TO PEDESTRIAN—SUFFICIENCY OF NEGATIVE EVIDENCE. There is sufficient evidence to support a finding of the violation of a city ordinance making it unlawful to leave any team standing unless it is securely fastened, where a delivery team equipped with a hitching weight ran away and eyewitnesses testified that they saw no weight dragging, although the driver testified on direct examination that he dropped the weight and set the brake; and the testimony in support of the verdict is not so purely negative as to preclude the jury from determining its weight, especially where the driver on cross-examination admitted that he sometimes did leave the team without hitching it. *Kahaley v. Frye & Bruhn*..... 43

20. SAME—INSTRUCTIONS. In an action for injuries through the running away of a team left unhitched, where proof of a custom of hitching teams by a weight was admitted to show the manner of hitching, upon an issue as to whether the driver dropped the weight, it is not error to instruct that the question was what the driver did and not what other teamsters were in the habit of doing. *Kahaley v. Frye & Bruhn*..... 43

21. MUNICIPAL CORPORATIONS—STREETS—INJURIES FROM AUTOMOBILE—OWNERSHIP—EVIDENCE—SUFFICIENCY. In an action for personal injuries by a pedestrian struck by an automobile, the evidence is sufficient to establish defendant's ownership of the automobile, although denied by himself and wife, where an unrecorded bill of sale thereof to his wife had unexplained erasures showing that it had been made to the defendant, the state license had been taken out in his name, and also a city taxicab license, under which the machine was being operated by a chauffeur. *Delano v. La Bounty*..... 595

22. SAME—LICENSE—INSTRUCTIONS. Under Rem. & Bal. Code, § 5563, requiring the owner of every automobile to file in the office of the secretary of state his name and address and a description of the vehicle owned by him and obtain a certificate, the certificate is *prima facie* proof of ownership; and an instruction that it was a mere circumstance to be considered in determining the credibility of witnesses is properly refused. *Delano v. La Bounty*..... 595

23. MUNICIPAL CORPORATIONS — USE OF STREETS — AUTOMOBILES — INSTRUCTIONS—CARE REQUIRED. It is not prejudicial error to instruct that the owner of an automobile must exercise "exceeding" care upon

MUNICIPAL CORPORATIONS—CONTINUED.

the busy streets of a city, where in other instructions the jury were told that he must exercise reasonable care to avoid injuring any one, and would be liable if he failed to exercise such care as an ordinary prudent person would exercise under like circumstances. *Domke v. Gunning* 629

24. SAME—COMMENT ON FACTS. In instructions as to the care required of the driver of an automobile, a phrase "moving quietly as it does," it not an unlawful comment on the evidence, where it had reference to automobiles generally and not to the one in question. *Domke v. Gunning*..... 629

25. SAME—CARE REQUIRED. An instruction as to the care required of the driver of an automobile in a busy city street properly requires him to exercise such skill and care as to anticipate such collisions as the nature of the machine and the locality might suggest as liable to occur in the absence of such precautions. *Domke v. Gunning*... 629

26. SAME—REGULATIONS—ORDINANCES—"CURB"—BARRICADES. Under a city ordinance requiring drivers of automobiles upon turning corners to leave a space of six feet between the curb and the automobile, a fence or barricade in the street in front of a building that was being erected is properly taken as the "curb," where pedestrians were required to leave the walk and step into the street outside the fence or barricade. *Domke v. Gunning*..... 629

27. MUNICIPAL CORPORATIONS—USE OF STREETS — AUTOMOBILES — CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS. An instruction that plaintiff, struck by an automobile, cannot recover if her negligence contributed in any "appreciable" degree is not objectionable as equivalent to "important" or "material" degree. *Domke v. Gunning*.....629

28. MUNICIPAL CORPORATIONS—INDEBTEDNESS—BONDS — SUBMISSION TO VOTERS—DISTINCT PROPOSITIONS. Under const., art. 8, § 6, providing that no city shall become indebted in excess of one and one-half per cent of the taxable property without the assent of three-fifths of the voters therein voting at an election held for that purpose, a city cannot submit to the voters a bond issue to raise money for several distinct purposes, in no way related to each other, in a such a way that the voters must vote for or against all the propositions; "assent" meaning that the voters shall freely express their approval of each of the various objects sought. *Blaine v. Seattle*..... 445

29. MUNICIPAL CORPORATIONS—TAXATION — LIMITATIONS — CHARTER — STATUTES—CONFLICT. Rem. & Bal. Code, § 9281, providing that the city council shall fix the tax rate "needed to raise sufficient revenue to carry on the municipal government for one year," does not conflict with the Everett city charter § 222, limiting the levy to eight mills on the dollar, under the rule that the two must be construed

MUNICIPAL CORPORATIONS—CONTINUED.

together and harmonized if possible; since the statute merely requires the fixing of the rate within the limit, and a levy in excess of eight mills is accordingly void. *McGill v. Hedges*..... 274

MURDER:

See HOMICIDE.

MUTUAL INSURANCE:

See INSURANCE, 5, 6.

NECESSITY:

Notice of dishonor of note, see BILLS AND NOTES, 4.

For condemning particular route for toll logging road, see EMINENT DOMAIN, 6.

For pleading payment, see PAYMENT.

NEGATIVE PREGNANT:

See PLEADING, 4.

NEGLIGENCE:

Of employer, see MASTER AND SERVANT.

Risks assumed by servant, see MASTER AND SERVANT, 11-14, 21, 22, 28.

Contributory negligence of servant as question for jury, see MASTER AND SERVANT, 18, 19, 21, 24-29.

Of city officer in driving automobile in city street, see MUNICIPAL CORPORATIONS, 17.

Of person injured on street, see MUNICIPAL CORPORATIONS, 27.

1. NEGLIGENCE—DANGEROUS PREMISES—LIABILITY OF OWNER—MASTER AND SERVANT—INDEPENDENT CONTRACTOR. A building contractor, who undertakes the entire construction of a building, having full charge of the work, the furnishing of labor and material, and exclusive possession, is an independent contractor, and the owner is not liable for his negligence in leaving an opening near the sidewalk during the work of construction, whereby a pedestrian fell into the basement and was injured, where the opening was not a nuisance in the street itself, within Rem. & Bal. Code, § 8309, and was not called for in the contract, and the injury was not the result of any requirement in the contract. *Cary v. Sparkman & McLean Co*.... 363

2. SAME—NEGLIGENCE OF INDEPENDENT CONTRACTOR—PROXIMATE CAUSE OF ACCIDENT. Where a pedestrian stepping off the sidewalk fell into an opening next to the lot line, carelessly left unguarded by the contractor, the proximate cause of the accident is the failure to guard the opening, and not the provisions of the contract calling for a basement window at that place. *Cary v. Sparkman & McLean Co.* 363

NEGOTIABLE INSTRUMENTS:

See BILLS AND NOTES.
State warrants, see STATES, 2.
Commercial paper, see USURY.

NEWSPAPERS:

Libel, see LIBEL AND SLANDER.

NEW TRIAL:

Review of ruling on motion as dependent on exception in lower court, see APPEAL AND ERROR, 6.
In criminal prosecutions, see CRIMINAL LAW, 10, 11.
Inadequate verdict for personal injuries, see DAMAGES, 6.

NONSUIT:

See DISMISSAL AND NONSUIT.

NOTES:

Promissory notes, see BILLS AND NOTES.

NOTICE:

Of appeal, see APPEAL AND ERROR, 8.
Of settlement of statement of facts, see APPEAL AND ERROR, 10, 11.
Of dishonor, see BILLS AND NOTES, 4, 5, 12.
As affecting *bona fides* of holder of note, see BILLS AND NOTES, 6, 7.
Of election to rescind and rights of parties, see EXCHANGE OF PROPERTY.
Of application for appointment of guardian, see INSANE PERSONS.
Revocation by landlord of notice to quit, see LANDLORD AND TENANT, 2.
Duplicate statement to owner of materials furnished contractor, see MECHANICS' LIENS, 5, 6.
Record of mortgage as notice, see MORTGAGES, 1-3.
To agent as binding principal, see PRINCIPAL AND AGENT, 7.
Of action or process, see PROCESS.
Of application to cancel state oyster land deed, see PUBLIC LANDS, 5.
To seller of breach of warranty, see SALES, 4, 5.
Of forfeiture to vendee, see VENDOR AND PURCHASER, 10.

NUISANCE:

Right to damages on abatement of after threatened action by city, see MUNICIPAL CORPORATIONS, 18.

1. NUISANCE—CHARCOAL KILNS—EVIDENCE. A *prima facie* case of a nuisance is made out by evidence that charcoal kilns within the city gave out quantities of smoke and at times poisonous gases. *Richards v. Seattle* 684

2. NUISANCE—ABATEMENT—DEFENSES. The abatement of a nuisance cannot be prevented by reason of the fact that there were similar nuisances in the vicinity. *Richards v. Seattle*..... 684

OATH:

Of prosecuting attorney, see INDICTMENT AND INFORMATION, 1.

OBJECTIONS:

Necessity for purpose of review, see APPEAL AND ERROR, 3, 4.
To assessment for public improvements, see MUNICIPAL CORPORATIONS, 7, 9, 11.
To pleadings, see PLEADING, 1, 8, 13.
To tender, see TENDER.

OBSTRUCTIONS:

Use of street by railroads, see MUNICIPAL CORPORATIONS, 11-16.

OFFERS:

Offers to sell as evidence of value of land, see EVIDENCE, 11.

OFFICERS:

Conferring judicial powers on state officer, see CONSTITUTIONAL LAW, 2.
Corporate officers, fraud of, see CORPORATIONS, 2.
Municipal officers, see MUNICIPAL CORPORATIONS, 2, 4.
Liability of city for torts of, see MUNICIPAL CORPORATIONS, 17.
Authority of land commissioner to cancel state oyster land deed, see PUBLIC LANDS, 4, 5.
Duty of state treasurer to refuse payment of illegal warrants, see STATES.

OPENING:

Judgment, see JUDGMENT, 1.

OPINION EVIDENCE:

In civil actions, see EVIDENCE, 8-11.

OPTION:

Of payee to hasten maturity of note, see BILLS AND NOTES, 11.
Cancellation of, see CANCELLATION OF INSTRUMENTS.
To terminate lease on payment of bonus, see LANDLORD AND TENANT, 3.

ORAL CONTRACTS:

See FRAUDS, STATUTE OF.

ORDERS:

Review, see APPEAL AND ERROR.
Of railroad commission, see RAILROADS.
For sale upon foreclosure of tax lien, see TAXATION, 3.

ORDINANCES:

Amendment pending appeal as cessation of controversy, see APPEAL AND ERROR, 2.
Regulations for drivers of automobiles, see MUNICIPAL CORPORATIONS, 26.

OSTEOPATH:

Violation of statute by as defense in action for libel, see LIBEL AND SLANDER.

OWNERSHIP:

Of stolen goods, see RECEIVING STOLEN GOODS.

OYSTERS:

Cancellation of state oyster deed, see CONSTITUTIONAL LAW, 2; PUBLIC LANDS, 4, 5.

PAROL CONTRACTS:

See FRAUDS, STATUTE OF.

PAROL EVIDENCE:

In civil actions, see EVIDENCE, 4-7.

To explain stipulation for assessment to property damaged by improvement, see MUNICIPAL CORPORATIONS, 5.

PARTIES:

Entitled to allege error, see APPEAL AND ERROR, 2, 12.

On appeal or writ of error, see APPEAL AND ERROR, 7.

Pleading defense by party defendant on breach of contract executed on behalf of others, see CONTRACTS, 2.

Action against corporation, see CORPORATIONS, 3, 4.

Dismissal of action to cancel note and mortgage as affecting intervener's rights as holder to foreclose, see DISMISSAL AND NONSUIT.

Entitled to compensation for injury to property, see EMINENT DOMAIN, 7, 8.

Entitled to sue on injunction bond, see INJUNCTION.

Right to maintain action for libel, see LIBEL AND SLANDER.

Persons who may marry, see MARRIAGE.

Persons entitled to mechanic's lien, see MECHANICS' LIENS, 4.

Persons entitled to redeem from mortgage foreclosure sale, see MORTGAGES, 9.

Persons entitled to relief by prohibition, see PROHIBITION.

Entitled to declare forfeiture of contract of sale, see VENDOR AND PURCHASER, 5.

1. PARTIES—INTERVENTION—LEAVE OF COURT. Application for leave to intervene being made *ex parte*, the refusal of the court to strike a complaint in intervention, filed without leave, is equivalent to an order permitting the filing thereof. *Pickle v. Anderson*..... 552

PASSENGERS:

See CARRIERS.

PATENTS:

For public lands, see PUBLIC LANDS, 3.

PAYMENT:

See TENDER.

Refusal of passenger to pay fare, see CARRIERS, 1.

As affecting oral modification of contract for sale of goods, see FRAUDS, STATUTE OF, 3.

Of bonus on terminating lease as forfeiture, see LANDLORD AND TENANT, 3.

Mandamus to compel payment of state warrant, see MANDAMUS.

Nonpayment as defense avoiding liability for breach of contract, see SALES, 13.

Price of goods sold, see SALES, 7, 8.

Illegal state warrants, see STATES.

Demand by vendor for payment, see VENDOR AND PURCHASER, 7, 8, 10.

Burden of proving payment for services, see WORK AND LABOR, 2.

1. PAYMENT—PLEADING. Payment is an affirmative defense to be pleaded, and cannot be raised under a claim of want of consideration. *Pickle v. Anderson*..... 552

PENALTIES:

Under contracts, see DAMAGES, 1.

PERFORMANCE:

Tender of by vendor, see VENDOR AND PURCHASER, 6, 7.

Rescission by vendor for nonperformance, see VENDOR AND PURCHASER, 9.

PERSONAL INJURIES:

See ASSAULT AND BATTERY; NEGLIGENCE.

Harmless error in rulings in action for, see APPEAL AND ERROR, 32-36, 38.

Assault on passenger by street car conductor, see CARRIERS, 6, 7.

Inadequate or excessive damages, see DAMAGES, 3-6.

To employee, see MASTER AND SERVANT.

To traveler on city street, see MUNICIPAL CORPORATIONS, 17, 19-27.

Witnesses in action for, see WITNESSES.

PHYSICIANS AND SURGEONS:

Time for taking appeal from decision of medical board, see APPEAL AND ERROR, 8.

As experts, see EVIDENCE, 9.

Violation of statute as defense in action by doctor for libel, see LIBEL AND SLANDER.

PLACE:

Failure to designate in notice of settlement of statement of facts, see APPEAL AND ERROR, 10.

Of tax sale, see TAXATION, 4.

PLEADING:

See LIBEL AND SLANDER, 3.
Answer as plea in abatement, see ABATEMENT AND REVIVAL.
Incorporating in record on appeal, see APPEAL AND ERROR, 9.
Review of ruling as dependent on prejudicial nature of error, see APPEAL AND ERROR, 20.
Continuance on allowing supplemental complaint, see CONTINUANCE.
For breach of contract, see CONTRACTS, 2.
In action against corporation, see CORPORATIONS, 3, 4.
Variance in prosecution for murder, see HOMICIDE, 1.
Marriage as defense in prosecution for incest, see INCEST.
Indictment or criminal information or complaint, see INDICTMENT AND INFORMATION.
Determining sufficiency of information on demurrer, see INDICTMENT AND INFORMATION, 3.
Conclusiveness of judgment on demurrer, see JUDGMENT, 2.
Absence of pleadings in condemnation proceedings as affecting conclusiveness of judgment, see JUDGMENT, 4.
Complaint for personal injuries, sufficiency, see MASTER AND SERVANT, 19.
Foreclosure of mortgage notes, see MORTGAGES, 5.
Filing complaint in intervention, see PARTIES.
Payment as defense, see PAYMENT.
For price of goods sold, see SALES, 7.
For services, see WORK AND LABOR, 3.

1. PLEADING—COMPLAINT—SEPARATE STATEMENT OF CAUSES—OBJECTION HOW TAKEN. Objection to a complaint for not separately stating the several causes of action cannot be taken by demurrer, but only by motion. *Peterson v. Pantheon Lumber Co*..... 189

2. PLEADING—ANSWER—INCONSISTENT DEFENSES—ELECTION. Defenses so inconsistent that one must necessarily be untrue are not permissible under the code; and in an action for the price of a traction engine, a defense that the notes and contract were only delivered conditionally and were not effective or delivered, because the engine did not fulfill conditions, is inconsistent with a counterclaim for damages by reason of the insufficiency of the engine; and defendant is properly required to elect between them. *Hart-Parr Co. v. Keeth* 464

3. PLEADING—ANSWER — GENERAL DENIAL — SUFFICIENCY. A general denial of each and every allegation of a paragraph of a complaint alleging that a certain sum is the reasonable value of plaintiff's services is sufficient to put the same in issue, under Rem. & Bal. Code, § 264 (authorizing either a general or a specific denial), without any specific denial that some lesser sum was due; since a general denial under the code is the equivalent of the general issue. *Peters v. McPherson* 496

PLEADING—CONTINUED.

4. PLEADING—ANSWER—NEGATIVE PREGNANT. A denial in manner and form that plaintiffs expended the specified sum of money alleged by them, in a certain action or at all, is a negative pregnant and insufficient. *Peters v. McPherson*..... 496

5. PLEADING—DEMURRER—SEVERAL CAUSES. A general demurrer to several causes of action on the ground that the statute of limitations has run must be overruled if any one of the causes is not barred by the statute. *Peterson v. Pantheon Lumber Co*..... 189

6. PLEADING—AMENDMENT—DISCRETION. It is not an abuse of discretion to refuse leave to amend an answer at the trial by substituting a general denial for certain admissions respecting a contract alleged in the complaint, where the action had been pending several months, the case had been regularly set for trial, and a jury empaneled to try the case. *Eaton v. General Compressed Air & Vacuum Machinery Co.* 373

7. PLEADINGS — AMENDMENT — DILIGENCE — DISCRETION. It is discretionary to refuse leave to file amended answers at the trial, where two years had elapsed after demurrers were sustained to the new matter in the answers. *State ex rel. Schmidt v. Superior Court*. 556

8. PLEADINGS—OBJECTION TO COMPLAINT—AMENDMENTS TO CONFORM TO PROOF. A motion for a nonsuit on the ground that an essential fact had not been alleged in the complaint is properly denied where the motion was not made until the fact had been proved; since the complaint will be deemed amended. *Carlisle Packing Co. v. Deming* 455

9. PLEADING — COMPLAINT — SUPPLEMENTAL COMPLAINT. Notwithstanding Rem. & Bal. Code, § 308, allowing supplemental pleadings to show facts that occurred "after the former pleadings were filed," it is not error to permit a supplemental complaint to show facts that arose subsequent to the commencement of the action but prior to the filing of an amended complaint, and within the pleader's knowledge at the latter date, in view of the common law rule and the liberal rules of pleading enjoined by the code. *Edwards v. Seattle, Renton & Southern R. Co*..... 77

10. PLEADING—ANSWER—PLEA OF TENDER—JUDGMENT ON PLEADINGS. A plea of tender does not entitle the defendant to judgment on the pleadings, since the plaintiffs can admit the same without waiving their cause of action. *Peters v. McPherson*..... 496

11. PLEADINGS — ISSUES AND PROOF — GENERAL DENIAL. Waiver by plaintiff of a contract for services may be shown in an action for the services under a general denial, where the evidence tended to show that the services had not been performed. *Butz v. Cook*.. 90

12. PLEADING — VARIANCE — CONTRACT — CONSTRUCTION. In an action upon a contract to recover "10 per cent on any business" done for the defendant, it is not a failure of proof or a material variance to

PLEADING—CONTINUED.

prove a contract by defendant's letters for "a commission of ten per cent on all goods of our manufacture" where in another letter "ten per cent on any business you secure for us" was stated to mean "ten per cent to you on all goods of our manufacture." *Eaton v. General Compressed Air & Vacuum Machinery Co*..... 373

13. PLEADING—OBJECTIONS — WAIVER. Where no demurrer is interposed to a complaint, it will be liberally construed and the cause determined by the proof, rather than by a strict construction of the pleadings. *Johnson v. Ryan*..... 60

PLEDGES:

1. PLEDGES — CORPORATE STOCK — FORECLOSURE — EVIDENCE — SUFFICIENCY. In an action to foreclose a pledge of corporate stock, it is error to grant a nonsuit where plaintiff's evidence showed that he sold the stock to defendant, but retained possession as collateral security for a note for the purchase price, which was due and unpaid; the burden of proving an affirmative defense being upon the defendant. *McVay v. Reese*..... 562

POLICY:

Of insurance, see INSURANCE.

POSSESSION:

Presumption from possession of stolen property, see CRIMINAL LAW, 12.

As affecting oral sale of land, see FRAUDS, STATUTE OF, 1, 2.

Of trust property as affecting statute of frauds, see TRUSTS.

POWERS:

Legislative powers of city of first class, see MUNICIPAL CORPORATIONS, 2, 4.

Vested in mayor of city of first class, see MUNICIPAL CORPORATIONS, 4.

Of city to grant franchise to railroad to use streets, see MUNICIPAL CORPORATIONS, 11-16.

Of agent, see PRINCIPAL AND AGENT, 3, 4.

Of land commissioner to cancel state oyster land deed, see PUBLIC LANDS, 4, 5.

PRACTICE:

See APPEAL AND ERROR; CONTINUANCE; CRIMINAL LAW; DEPOSITIONS; PLEADING; TENDER; TRIAL.

PREEXISTING DEBT:

Priority of mortgage given for, see MORTGAGES, 1.

PREJUDICE:

Ground for reversal in civil actions, see APPEAL AND ERROR, 20-38.

PRESCRIPTION:

Creation of easement, see EASEMENTS, 1.

PRESENTMENT:

Of bill or note, see BILLS AND NOTES, 4, 5.

PRESUMPTIONS:

Jurisdiction of action against foreign corporation, see CORPORATIONS, 4.
Possession of stolen property, see CRIMINAL LAW, 12.
In civil actions, see EVIDENCE, 1.
Community nature of obligation, see HUSBAND AND WIFE, 4.
As to giving of signal, see MASTER AND SERVANT, 7.
As to mutual services rendered as gratuity, see WORK AND LABOR, 1.

PRINCIPAL AND AGENT:

See BROKERS.
Necessity of notice of dishonor to indorser having custody of note as agent, see BILLS AND NOTES, 4, 5.
Service of summons on agent, see CORPORATIONS, 4, 5.
Advances to agent and liability for repayment, see INSURANCE, 1, 2.

1. PRINCIPAL AND AGENT—FRAUD—ACCOUNTING BY AGENT. Where an agent defrauds his principal by purchasing property and misrepresenting the price paid, the principal need not rescind the sale, but may recover money paid not used by the agent in the purchase. *Watson v. Bayliss*..... 329

2. SAME. An agent employed to purchase property at the best price obtainable cannot deceive his principal and make a profit thereon by reason of the fact that he held an option on the property at the time of his employment. *Watson v. Bayliss*..... 329

3. PRINCIPAL AND AGENT—AUTHORITY OF AGENT. A surety company having in writing notified the obligee that the adjustment of the principal's default had been referred to a particular agent, it is within the scope of the agent's powers, in the absence of any express limitation, to waive performance of the terms of the bond. *Keenan v. Empire State Surety Co*..... 250

4. PRINCIPAL AND AGENT—POWERS OF AGENTS—LIMITATIONS—SALES. A contract for the sale of a separator, providing that general agents of the seller had no general agency powers, does not limit the powers of an agent sent by the company to deal with reference to conditions arising subsequent to the execution of the contract, when it was found that the machine was unable to do its work. *Womach v. Case Threshing Machine Co*..... 661

5. PRINCIPAL AND AGENT—CONTRACTS—PERSONAL LIABILITY OF AGENT—CORPORATIONS. Where a resident manager, who was the principal stockholder and responsible head of two foreign corporations, entered into a contract which he promised to reduce to writing, but failed

PRINCIPAL AND AGENT—CONTINUED.

to do so, so that it was left indefinite as to who the responsible parties were, he cannot claim that he was not personally liable, in the face of evidence that the other party was dealing with and relied upon him. *Carlisle Packing Co. v. Deming*..... 455

6. PRINCIPAL AND AGENT—LIABILITY TO PRINCIPAL—AMBIGUOUS INSTRUCTIONS, Instructions to an agent to use certain moneys in closing up a loan and the payment of judgments so that the loan would be a first lien on the land, do not render the agent liable for failure to pay off judgments that were subsequent to the mortgage, where in other letters the agent was instructed that the principal was not interested in these judgments and not to delay closing up the loan on account of them; since the instructions as a whole were ambiguous and susceptible of the construction that part of the money was to be paid to the borrower, which was done by the agent in good faith. *Bevis v. Big Bend Abstract Co*..... 513

7. PRINCIPAL AND AGENT—NOTICE TO AGENT—EXISTENCE OF RELATION—EVIDENCE—SUFFICIENCY. In an action to foreclose a chattel mortgage, brought against a vendee of the property who had assumed payment of the notes secured by the mortgage, the vendee is bound by the notice and the knowledge of a person employed by the vendee to represent her in securing the mortgagee's consent to the sale and to ascertain the amount due on the notes and mortgage assumed by her, even if such person had acted as a broker or agent for the vendor in effecting the sale; and the evidence is sufficient to establish such relation of principal and agent, where the vendee authorized her son-in-law to represent her in closing the deal and he employed such person to assist him in the matter. *Wilkinson v. Bergquist* 119

PRINCIPAL AND SURETY:

Authority of agent to waive performance of terms of bond, see PRINCIPAL AND AGENT, 3.

1. PRINCIPAL AND SURETY—OBLIGATION OF SURETY—CONTRACT. There is no liability on a surety bond guaranteeing the performance of a building contract, where the parties had entered into, and the building was completed under, a new contract materially different calling for larger payments to the contractor during the progress of the work. *Kracht v. Empire State Surety Co*..... 339

2. PRINCIPAL AND SURETY—DISCHARGE OF SURETY—MODIFICATION OF CONTRACT—WAIVER. A surety company guaranteeing the performance of building contract waives a provision that the owner shall retain fifteen per cent of payments due for labor etc. until after completion of the contract, where, with the knowledge and cooperation of the agent to whom the company referred the matter, the contract was modified and the owner authorized to pay obligations as they accrued. *Keenan v. Empire State Surety Co*..... 250

PRINCIPAL AND SURETY—CONTINUED.

3. PRINCIPAL AND SURETY—DISCHARGE OF SURETY—AGREEMENTS. An agreement between a surety company and the obligee on the bond that a certain person should act as arbiter between them is not void by reason of the fact that such person was a debtor of the obligee, there being no showing that he did not act disinterestedly. *Keenan v. Empire State Surety Co* 250

PRIORITIES:

Of mortgages, see MORTGAGES, 1, 3, 9.

PRIVATE ROADS:

Rights of way, see EASEMENTS.

PRIVILEGE:

Testimony of attorney, see TAXATION, 6.

PRIVILEGED COMMUNICATIONS:

Disclosure by witness, see WITNESSES, 2, 3.

PROBABLE CAUSE:

For malicious prosecution, see MALICIOUS PROSECUTION, 1.

PROCEEDS:

Application of, see MORTGAGES, 4, 6.

PROCESS:

See CORPORATIONS, 3-5.

On appeal, see APPEAL AND ERROR, 8.

Service of notice of application for appointment of guardian, see INSANE PERSONS.

Action to vacate tax foreclosure, see TAXATION, 5.

1. PROCESS—SUMMONS—SERVICE BY PUBLICATION—AFFIDAVIT—NECESSITY. An affidavit for the service of summons by publication is insufficient under Rem. & Bal. Code, § 228, where it fails to state that the defendant is a nonresident, or has property in this state, or the existence of any of the facts authorizing a service by publication, notwithstanding the facts may appear from the complaint; since strict compliance with the statute is jurisdictional. *Felsinger v. Quinn* 183

PROFITS:

Loss of on breach of contract, see SALES, 12.

PROHIBITION:

1. PROHIBITION—PARTIES ENTITLED—TAXPAYERS—OBJECTION TO GRAND JURY. A taxpayer is not a "person beneficially interested" within Rem. & Bal. Code, § 1028, and prohibition does not lie on his application to restrain the superior court from summoning a grand jury because of alleged error in the drawing. *State ex rel. Hanna v. Main* 242

PROMISE:

Of master to remedy defect in appliance or working place, see MASTER AND SERVANT, 12, 13, 23.

PROMISSORY NOTES:

See BILLS AND NOTES.

PROPERTY:

Possession of stolen property, see CRIMINAL LAW, 12.
Taking or damaging for public use, see EMINENT DOMAIN.
Opinion of expert as to value, see EVIDENCE, 10, 11.
Community or separate, nature of, see HUSBAND AND WIFE.
Recovering possession or value of, see REPLEVIN.
Held in trust, see TRUSTS.

PROXIMATE CAUSE:

Of fire, see INSURANCE, 4.
Cause of accident as question for jury, see MASTER AND SERVANT, 15, 16.
Of injury, see NEGLIGENCE, 2.

PUBLICATION:

Service of process, see PROCESS.
Summons in action to vacate tax foreclosure, see TAXATION, 5.

PUBLIC DEBT:

Method of submission to voters of bond issue to raise money for several distinct purposes, see MUNICIPAL CORPORATIONS, 28.

PUBLIC LANDS:

Power to cancel state oyster deed as encroachment on judiciary, see CONSTITUTIONAL LAW, 2.
Statutes providing for cancellation of state oyster deeds, see STATUTES, 3.

1. PUBLIC LANDS—CLASSIFICATION—HOMESTEADS—RIGHTS OF ENTRYMAN. The rights of one who goes upon vacant, unsurveyed public land subject to settlement under the homestead laws, with intent to enter the same, depends upon the character of the land; and land erroneously classified by the government as a lake is not subject to homestead entry. *Gauthier v. Morrison*..... 572

2. PUBLIC LANDS — SURVEY AND CLASSIFICATION — JURISDICTION OF COURTS—LAND DEPARTMENT—AUTHORITY. Under the Federal statutes the exclusive control of the public lands and surveys and the correction of the same being vested in the land department, the state courts have no jurisdiction of an action to recover possession of alleged lands, erroneously and fraudulently surveyed and classified by the government as a lake, the United States not being a party to the action and no remedy having been sought in the land department. *Gauthier v. Morrison*..... 572

PUBLIC LANDS—CONTINUED.

3. PUBLIC LANDS—HOMESTEAD—EXEMPTION FROM PRIOR DEBTS. Lands acquired under the homestead laws are not subject to a judgment upon a note given between the making of final proof and the issuance of patent, under U. S. Rev. St. § 2296, providing that they shall not be liable in any event to the satisfaction of any debt contracted prior to the issuing of patent. *Sprinkle v. West*..... 587

4. PUBLIC LANDS—OYSTER LANDS—DEEDS — CANCELLATION — POWERS OF OFFICERS. The state land commissioner is authorized to hear and determine an application for the cancellation of a state deed for oyster lands, by Rem. & Bal. Code, § 6804, providing that if oyster lands sold by the state shall be used for any other purpose than oyster culture, the deed shall be cancelled upon application to the state land commissioner. *State ex rel. Abbott v. Ross*..... 82

5. PUBLIC LANDS—OYSTER LANDS—DEEDS — CANCELLATION — NOTICE. Under Rem. & Bal. Code, § 6804, providing for the cancellation by the commissioner of public lands of state oyster land deeds for breach of condition, but which fails to provide the form of notice to be given to the grantee, any suitable notice of application for the cancellation is sufficient. *State ex rel. Abbott v. Ross*..... 82

PUBLIC NUISANCE:

See NUISANCE.

PUBLIC USE:

Taking property for public use, see EMINENT DOMAIN.

QUESTION FOR COURT:

Directing verdict for plaintiff in action for breach of contract, see CONTRACTS, 5.

QUESTION FOR JURY:

In action for injury to servant, see MASTER AND SERVANT, 15, 20-24, 26-28.

QUIETING TITLE:

See CORPORATIONS, 3.

RAILROAD COMMISSION:

Orders for train service, see RAILROADS.

RAILROADS:

Carriage of goods and passengers, see CARRIERS.
Appropriation of property, see EMINENT DOMAIN, 1-6, 8.
As employers, see MASTER AND SERVANT, 12, 13, 20, 24, 25.
Use of city streets, see MUNICIPAL CORPORATIONS, 11-16.
In city streets, see STREET RAILROADS.

RAILROADS—CONTINUED.

1. RAILROADS—RATES—REGULATION—REASONABLENESS — TRAIN SERVICE. An order of the railroad commission requiring a daily mixed freight and passenger service over a branch line fourteen miles long is unreasonable, where the income from passenger travel resulting therefrom was only 9 cents per mile, and cost over thirty cents per mile, the present bi-weekly freight service was adequate and a financial loss to the company, which loss would be increased by the change without any great necessity for it. *State ex rel. Northern Pac. R. Co. v. Railroad Commission*..... 193

RAPE:

1. RAPE—STATUTORY RAPE—DEFENSES—PREVIOUS CHASTE CHARACTER. Under an information charging rape on or about March 1st, by carnally knowing a female child between 15 and 18 years of age, of previous chaste character, where the prosecutor elected an act of January 20th, the defense that the prosecutrix was not then of chaste character, by reason of previous relations with the accused, is not available, where all their acts occurred in the same county, within one month; since any one of the acts would have sustained a conviction under the information. *State v. Sargent*..... 692

REAL ESTATE AGENTS:

See BROKERS.

REAL PROPERTY:

Recovery of, see EJECTMENT.
Condemnation for public use, see EMINENT DOMAIN.
Community or separate, see HUSBAND AND WIFE.
Actions affecting title to real property, see VENUE.

RECEIPTS:

Bona fide holder of receipts given by agent for advances, see INSURANCE, 2.

RECEIVING STOLEN GOODS:

Different acts as continuous transaction, see INDICTMENT AND INFORMATION, 2.
Different acts constituting one transaction amounting to grand larceny, see LARCENY.

1. RECEIVING STOLEN GOODS—EVIDENCE—OWNERSHIP—SPECIAL PROPERTY. A conviction of larceny by the receipt of wheat stolen from railway cars may be had without evidence that the railway company owned the wheat, in view of Rem. & Bal. Code, § 2303, subd. 16, providing that any one having a general or special interest shall be deemed the owner; also where it was shown that the defendant knew the wheat was stolen. *State v. Ray*..... 582

RECORDS:

On appeal, see APPEAL AND ERROR, 9-11.
As affecting priority of mortgage, see MORTGAGES, 1-3.

REDEMPTION:

From mortgage, see MORTGAGES, 8, 9.

REINSTATEMENT:

Of delinquent member in mutual life insurance company, see INSURANCE, 5, 6.

REMAND:

Of cause on appeal or writ of error, see APPEAL AND ERROR, 40-44.

RENT:

See LANDLORD AND TENANT, 5.
Limitation of action for, see LIMITATION OF ACTIONS.

REOPENING CASE:

Criminal prosecution, see CRIMINAL LAW, 9.

REPEAL:

Statutes relating to regulation and sale of liquor, see INTOXICATING LIQUORS.
Of statute prohibiting marriage, see MARRIAGE.
Of statutes in general, see STATUTES, 3, 4.

REPLEVIN:

1. REPLEVIN — VALUE OF PROPERTY — MEASURE OF DAMAGES. In an action to recover machinery or its value, sold under a conditional bill of sale, where there was evidence that it was worth its price, if it had been up to specifications, but that defendant had been damaged by defects and delay in installing it, the proper measure of its value to the plaintiff is the balance due on the contract price, less proper credits to the buyer. *Hallidie Machinery Co. v. Whidbey Island Sand & Gravel Co*..... 604

REQUESTS:

For instructions in civil actions, see TRIAL, 6, 7.

RESCISSION:

Cancellation of written instrument, see CANCELLATION OF INSTRUMENTS.
Of sale of corporate stock for fraud, see CORPORATIONS, 1.
Action to cancel deed as notice of election to rescind, see EXCHANGE OF PROPERTY.
Of lease, see LANDLORD AND TENANT, 2-4.
Of contract of sale of goods, see SALES, 2, 9.
Of contract for sale of land, see VENDOR AND PURCHASER, 2, 3, 9.

RES JUDICATA:

See JUDGMENT, 2-7.
Pleading decision before final judgment as bar to action, see ABATEMENT AND REVIVAL, 2.
Decision as law of case on second appeal, see APPEAL AND ERROR, 39.
Former decision as law of case, see COURTS.

RESTRICTIONS:

Against negotiating note, see BILLS AND NOTES, 3.

REVENUE:

See TAXATION.

REVIEW:

See APPEAL AND ERROR.
Of condemnation proceedings, see EMINENT DOMAIN, 9.
Of discretion of officers of mutual life insurance company in refusal to reinstate member, see INSURANCE, 5.
Proceedings to assess property for public improvement, see MUNICIPAL CORPORATIONS, 9, 10.

REVOCATION:

By landlord of notice to quit, see LANDLORD AND TENANT, 2.

RIGHT OF WAY:

See EASEMENTS.

RISKS:

Assumed by employee, see MASTER AND SERVANT, 11-14, 21, 22, 28.

ROADS:

Right of easement, see EASEMENTS.
Condemnation for toll logging road, see EMINENT DOMAIN, 1, 2, 6.

SAFE PLACE TO WORK:

See MASTER AND SERVANT, 3-6, 10, 14, 20, 21.

SALES:

Right to accounting on breach of contract, see ACCOUNT.
Of corporate stock, see CORPORATIONS, 1.
Purchase of corporate property at tax sale by officers of corporation, see CORPORATIONS, 2.
Admission of parol evidence, see EVIDENCE, 7.
Requirements of statute of frauds, see FRAUDS, STATUTE OF.
Of intoxicating liquors, see INTOXICATING LIQUORS.
Order for sale in probate as final adjudication, see JUDGMENT, 6.
Breach of contract as law action tried to jury, see JURY, 2.
On foreclosure of mortgage, see MORTGAGES, 5-7.
By agents, see PRINCIPAL AND AGENT, 1, 2, 4.

SALES—CONTINUED.

Specific performance of contract, see SPECIFIC PERFORMANCE.
Tax sales, see TAXATION.
Of realty, see VENDOR AND PURCHASER.

1. SALES—CONTRACT—CONSTRUCTION. A clause in a printed form of a contract for the sale of a separator providing that defects as to one article should not release the buyer from the obligation of paying for the others, has no application to the distinct parts of the separator and its furnishings, where they were all parts of one machine and useless in case the separator failed to thresh the grain. *Womach v. Case Threshing Machine Co*..... 661

2. SALES—FRAUD—REMEDIES OF BUYER—DAMAGES. Upon discovering misrepresentations as to the pedigree of a stallion, the buyer may, instead of rescinding, elect to keep the animal and recover his damages. *Kleeb v. McInturff*..... 508

3. SALES—CONTRACTS—WARRANTY—TRIAL BY BUYER. A contract for the sale of a separator, providing for notice if the machine failed to comply with the warranty after a trial of ten days, does not require a full ten days' trial, but only that a sufficient trial be given to demonstrate that it was incapable of doing its work. *Womach v. Case Threshing Machine Co*..... 661

4. SALES—CONTRACT—WARRANTY— NOTICE — DEFECTS — SUFFICIENCY. Where a contract for the sale of a separator provided that notice be given the seller of the failure of the machine to comply with the warranty, the fact that the buyer had purchased another machine before the notice was sent does not affect the timeliness of the notice. *Womach v. Case Threshing Machine Co*..... 661

5. SAME. Under a contract for the sale of a separator, providing that notice of defects shall specify the defective part, a notice that the separator would not thresh and save the grain is sufficient, where the fault lay with the separator, and the cause could not be ascertained by the buyer or the seller's experts. *Womach v. Case Threshing Machine Co*..... 661

6. SALES—WARRANTY—WAIVER OF CONDITIONS. The seller of a separator waives its right to claim that the purchaser had not complied with the covenants of warranty, where after notice, and after its experts were unable to remedy the defect, the seller gave directions as to the disposition of the machine and refused to furnish another. *Womach v. Case Threshing Machine Co*..... 661

7. SALES—ACTIONS FOR PRICE—PLEADING—COMPLAINT—SUFFICIENCY. A complaint states a cause of action for goods sold, etc., where it alleges that the plaintiff, at the special instance and request of the defendant, furnished certain goods and performed services in conducting the funeral of the defendant's husband and that defendant O. K.'d the bill; and it is immaterial that a bill of particulars

SALES—CONTINUED.

showed that defendant guaranteed payment within thirty days; since there was no inference that credit was extended to the estate, and the guarantee goes to the time and was not collateral to the promise of another. *Butterworth v. Bredemeyer* 134

8. SALES—PRICE—INSTALLMENTS DUE—DEFENSES—DEFECTS. Installments due on the purchase price of hoisting machinery to be installed and guaranteed by the seller cannot be withheld on account of minor defects, where the contract plainly indicates that the parties had in mind possible defects to be cured after the plant was completed. *Hallidie Machinery Co. v. Whidbey Island Sand & Gravel Co.* 604

9. SALES—FRAUD—MEASURE OF DAMAGES. The measure of damages for misrepresentations as to the pedigree of a horse, where the buyer does not rescind the sale, is the difference between the price paid and the actual value at the time of the sale. *Kleeb v. McInturff* 508

10. SALES — BREACH OF CONTRACT — DAMAGES. Where the seller breached a contract to furnish twenty-five carloads of egg case shooks for resale to eastern customers of the buyer, a jobber, who subsequently *bona fide* resold all of the same at a profit and was unable to fill the orders, the measure of damages is the net profit the buyer would have made, and not the difference between the contract and the market price; since the prospective profits were reasonably within the contemplation of the parties, although he had made no resales when the contract was made. *Sedro Veneer Co. v. Kwapil* 385

11. SAME—MITIGATION OF DAMAGES—BURDEN OF PROOF. In an action for damages for breach of a contract to furnish egg case shooks to a jobber for resale, the burden is upon the defendant to show that the buyer could have purchased the shooks elsewhere. *Sedro Veneer Co. v. Kwapil* 385

12. SAME—DAMAGES—PROSPECTIVE PROFITS — EVIDENCE — SUFFICIENCY. The evidence shows with sufficient certainty loss of prospective profits on contemplated resales of twenty-five carloads of egg case shooks, where it appears that he made *bona fide* resales thereof to his customers at a net profit of $100 per car. *Sedro Veneer Co. v. Kwapil* 385

13. SALES—BREACH—DEFENSES—NONPAYMENT. The seller of goods cannot avoid liability for breach of a contract by reason of the purchaser's failure to pay a balance due on goods delivered, where that was not assigned as a reason for failure to perform until after the damage to the buyer had already accrued. *Sedro Veneer Co. v. Kwapil* 385

14. SAME—ESTOPPEL. Breach of a seller's contract to fill orders of the buyer for a certain quantity of goods is not excused by the buyer's failure to file the orders within the time contemplated by

SALES—CONTINUED.

the contract, where the seller was then behind in filling the orders already filed, and thereafter the parties proceeded with the contract. *Sedro Veneer Co. v. Kwapil* 385

SALVAGE WATERS:

See WATERS AND WATER COURSES, 2.

SEPARATE ESTATE:

Of married women, see HUSBAND AND WIFE, 1-3.

SERVICE:

Of process on foreign corporation, see CORPORATIONS, 4, 5.
Of notice of application for guardian, see INSANE PERSONS.
Of process, see PROCESS.
Orders of railroad commission respecting train service, see RAILROADS.

SERVICES:

See WORK AND LABOR.

SETTLEMENT:

Of statement of facts, see APPEAL AND ERROR, 10, 11.

SIGNALS:

Delegation of master's duty, see MASTER AND SERVANT, 6-8.
Liability of master for negligence in giving signals, see MASTER AND SERVANT, 17, 26, 27.

SLANDER:

See LIBEL AND SLANDER.

SPECIFIC PERFORMANCE:

1. SPECIFIC PERFORMANCE—DEFENSES—FAILURE TO PAY PRICE—NOMINAL DAMAGES. Specific performance of an oral contract to convey land, of which the vendees were put in possession without making any payment, will not be decreed where the vendees breached a condition relating to the payment of part of the purchase price, the price to be paid was the full market value, and the vendees had incurred but a nominal expense in building a fence. *Packard v. Booth* 333

STARE DECISIS:

See COURTS.

STATEMENT:

Of case or facts for purpose of review, see APPEAL AND ERROR, 10, 11.
Duplicate statement to owner of material furnished contractors, see MECHANICS' LIENS, 5, 6.
Separate statement of causes of action, see PLEADING, 1.

STATES:

Conferring judicial powers on state officers, see CONSTITUTIONAL LAW, 2.

Mandamus to compel payment of warrant, see MANDAMUS.

Public lands, see PUBLIC LANDS, 4, 5.

1. STATES—STATE OFFICERS—TREASURER. It is the duty of the state treasurer to refuse payment of warrants illegally issued upon fraudulent claims. *State ex rel. Olympia Nat. Bank v. Lewis*..... 266

2. STATES—WARRANTS—NEGOTIABILITY—INNOCENT HOLDERS. A state warrant issued in payment of fraudulent claims based upon false and forged vouchers is void, even in the hands of an innocent holder, since a state warrant is not negotiable in the sense of excluding inquiry into the legality of its issue or defenses thereto. *State ex rel. Olympia Nat. Bank v. Lewis*..... 266

3. STATES—WARRANTS—AUDITING OF CLAIMS—ESTOPPEL. The fact that false claims against the state were audited and allowed by the board of military auditors, under Rem. & Bal. Code, §§ 7222 and 7223, does not preclude defenses to warrants thereon in the hands of an innocent holder, there being nothing in such sections to indicate an intent to make the warrants negotiable. *State ex rel. Olympia Nat. Bank v. Lewis*..... 266

STATUTES:

See BILLS AND NOTES, 7; INTOXICATING LIQUORS.

Construction of statute granting right of eminent domain to railroads, see EMINENT DOMAIN, 4, 5.

Presumptions as to laws, see EVIDENCE, 1,

Statute of frauds, see FRAUDS, STATUTE OF.

Practice of osteopathy in violation of statutes as defense to action for libel, see LIBEL AND SLANDER.

Of limitation, see LIMITATION OF ACTIONS.

Laws prohibiting marriage, implied repeal, see MARRIAGE.

Extent and application of laws relating to coal mines, see MASTER AND SERVANT, 10.

Laws controlling charters adopted by cities of first class, see MUNICIPAL CORPORATIONS, 1.

Adoption by city of commission form of government, see MUNICIPAL CORPORATIONS, 2, 3.

Vesting legislative powers in mayor and city council, see MUNICIPAL CORPORATIONS, 2, 4.

Validity of laws authorizing special assessment for improvement, see MUNICIPAL CORPORATIONS, 6.

Construction of statutes relating to use of city streets by railroad, see MUNICIPAL CORPORATIONS, 11.

Limitation on levy for taxes for municipal expenses, see MUNICIPAL CORPORATIONS, 29.

Venue of action for rents, see VENUE.

STATUTES—CONTINUED.

1. STATUTES—TITLES AND SUBJECT. An act "to regulate the practice and proceedings in civil actions" embraces but one object, within organic act, § 6. *Naden v. Christopher* 413

2. STATUTES—CONSTRUCTION—TITLE OF ACT. An act entitled an act "granting additional power" is not to be construed as granting any additional power where its provisions do not do so. *State ex rel. Schade Brewing Co. v. Superior Court* 96

3. STATUTES—IMPLIED REPEAL — PUBLIC LANDS — DEEDS — CANCELLATION. Rem. & Bal. Code, § 6804, providing for the cancellation of a state oyster land deed for breach of condition is not impliedly repealed by other general laws relating to tide lands somewhat inconsistent therewith; since there is no plain legislative intent to that end, and the act is not among the acts expressly repealed and may exist without any necessary conflict with the general acts. *State ex rel. Abbott v. Ross* 82

4. STATUTES—REPEAL—MUNICIPAL CORPORATIONS — LEGISLATIVE POWERS—CHARTERS—CONSTRUCTION. Rem. & Bal. Code, § 7504, authorizing electors of cities of the first class to frame and adopt a city charter, does not repeal Rem. & Bal. Code, § 7517, providing that the legislative powers of such city shall be vested in a mayor and city council, although it modifies and grants larger and more extensive legislative powers than those granted by § 7517. *Walker v. Spokane* 312

5. STATUTES — CONSTRUCTION — EQUITABLE CONSTRUCTION. Equitable construction of statutes, while tolerated in remedial statutes with great caution, should not be extended to regulations of public policy, and if the language is plain and free from ambiguity, inconvenience in its enforcement can have no weight in its construction. *Walker v. Spokane* 312

STAY:

Superseding judgment on appeal from election contest, see ELECTIONS.

STIPULATIONS:

For assessment to property damaged by improvement, see MUNICIPAL CORPORATIONS, 5.

STOCK:

Corporate stock, see CORPORATIONS, 1.

STOLEN GOODS:

See RECEIVING STOLEN GOODS.

STREET RAILROADS:

Carriage of passengers, see CARRIERS.
Excessive verdict for injuries to passenger, see DAMAGES, 4.

STREET RAILROADS—CONTINUED.

1. STREET RAILWAYS—TRANSFERS—DIVISION OF FARES—FRANCHISES—"LOCAL ROUTE"—"SUM OF RUNS"—CONSTRUCTION. Under a street car franchise providing for an exchange of transfers with other companies on a "basis of settlement that the transfers shall be redeemed at or for such proportionate part of the fare paid as the run or local route of the car on which transfer is received bears to the sum of the runs of the local route of the cars from which the transfer is issued and on which the transfer is received," the entire distance that a passenger may travel upon each system of railway constitutes a unit, equal in quantity and value, in the basis of settlement; and where only two systems were involved in an exchange, the sum of the runs is two, and settlement must be made by one-half of the fare to each company; the words "local route" meaning the entire distance a passenger may travel upon one system, regardless of the fact that different cars may be used; and "the sum of the runs" evidently being intended to cover the contingency of there being in the future more than two street car systems in the city exchanging transfers. *State ex rel. Linhoff v. Seattle, Renton & Southern R. Co.* 544

STREETS:

See HIGHWAYS; MUNICIPAL CORPORATIONS.
Right to condemn for use of railroad, see EMINENT DOMAIN, 3-5.

SUBCONTRACTORS:

Who are, and right to file lien as such, see MECHANICS' LIENS, 4.

SUBROGATION:

To rights of holder of note, see MARSHALING ASSETS.

SUFFERANCE:

Tenancy at sufferance, see LANDLORD AND TENANT, 5.

SUMMONS:

Service on agent of foreign corporation, see CORPORATIONS, 4, 5.
Vacation of tax foreclosure, see TAXATION, 5.

SUPERSEDEAS:

Bond on appeal from election contest, see ELECTIONS.

SUPPLEMENTARY PLEADING:

See PLEADING, 9.

SURVEYS:

Erroneous survey and classification of public lands, see PUBLIC LANDS, 1, 2.

TAXATION:

See INTOXICATING LIQUORS.

Purchase of corporate property at tax sale by officers of corporation, see CORPORATIONS, 2.

For payment of municipal expenses, see MUNICIPAL CORPORATIONS, 28, 29.

1. TAXATION—ASSESSMENT—LEASEHOLDS. Under Rem. & Bal. Code, § 9094, requiring the assessment of leaseholds as personal property, the tax value of a fifty year lease from the state, the lessee's buildings reverting at the end of the term, is the actual value of the term less rent reserved, to be determined by the present worth from year to year, considering also the term. *Metropolitan Building Co. v. King County* 409

2. TAXATION—ASSESSMENT—VALIDITY—VACATION. The assessment of a leasehold, fixed by the value of the lessee's improvements, having no basis in law, will be set aside, notwithstanding it could not be reviewed for mere overvaluation. *Metropolitan Building Co. v. King County* 409

3. TAXATION—FORECLOSURE—SALE—ORDER OF SALE. Under a statute requiring the judge in a tax foreclosure to order the clerk to enter an order of sale to be signed by the judge and attested by the clerk, and to certify a copy thereof to the treasurer, a judgment, signed by the judge, containing an order of sale is a sufficient order of sale; and failure of the clerk to "attest" the same does not render it void, where the clerk certified a copy thereof to the treasurer. *Trumbull v. Jefferson County* 503

4. SAME—PLACE OF SALE—JUDICIAL SALES. The requirement that a tax sale be made at the front door of the court house is complied with where it was held inside of the building, twenty-five or thirty feet from and in plain view of the glass front doors and of the people upon the street near the front doors. *Trumbull v. Jefferson County* 503

5. TAXATION—FORECLOSURE—VACATION—PROCESS—SUMMONS. A complaint to set aside a tax foreclosure, pleading *in haec verba* the only affidavit for publication of summons, alleges in substance the only attempted service, which, if insufficient, avoids the judgment. *Felsinger v. Quinn* 183

6. TAXATION—FORECLOSURE—VACATION — FRAUD — EVIDENCE — ADMISSIBILITY—ATTORNEY AND CLIENT—PRIVILEGE. Upon an issue of fraud in an action to set aside a tax foreclosure, where it appears that the certificate of delinquency was issued to the manager and secretary of a corporation, then the owner of the property, and assigned to a third party, and subsequently the corporation conveyed the property to plaintiff, and the tax foreclosure proceeded in the name of the assignee and against the corporation, the manager accepting service, without giving any notice to the plaintiff, it is error to exclude evi-

TAXATION—CONTINUED.

dence of the attorney who foreclosed the certificate, and ostensibly represented the assignee, showing that he was in fact employed by the manager of the corporation, the sole defendant in the foreclosure suit; since the attorney's testimony and letters between him and the manager are not privileged, and the existence of the relation of attorney and client between them would establish the fraud. *Collins v. Hoffman* 278

7. TAXATION—FORECLOSURE—VACATION—RECOVERY OF POSSESSION—JUDGMENT—FORM. Under § 3 of the betterment statute for the protection of occupants of land who had made improvements or paid taxes, the plaintiff should be given a provisional judgment granting the statutory options, title and immediate possession to be secured by final judgment in favor of the party entitled to receive it, at the expiration of the time limited. *Gould v. White*..... 406

8. TAXATION—FORECLOSURE—VACATION—INTEREST. Upon setting aside a void tax foreclosure, six per cent interest is properly allowed upon taxes paid, since the statutory penalty of 15 per cent runs only from the time the certificate is taken out until the taxes are paid, whether voluntarily or by foreclosure. *Gould v. White*..... 406

9. TAXATION—INHERITANCE TAX—EXECUTORS—ACCOUNTING. An inheritance tax is properly charged to the beneficiaries. *In re Lotzgesell's Estate* 352

TAXPAYER:

Right to restrain summoning of grand jury, see PROHIBITION.

TELEGRAPHS AND TELEPHONES:

Liability for discharge of telegraph operator, see MASTER AND SERVANT, 1, 2.

1. TELEGRAPHS—LEASE OF WIRE—CONDITIONS. A telegraph company may make it a condition of the lease of a wire that operators employed by the lessee shall be satisfactory to the company. *O'Brien v. Western Union Telegraph Co*..... 598

TENANCY IN COMMON:

Right of redemption from mortgage by one tenant as cessation of controversy, see APPEAL AND ERROR, 1.

Redemption from foreclosure sale, see MORTGAGES, 9.

TENDER:

As curing defects or errors at trial, see APPEAL AND ERROR, 29.

Of interest as defeating option to hasten maturity of note, see BILLS AND NOTES, 11.

Necessity of tendering bonus at time of notice terminating tenancy, see LANDLORD AND TENANT, 4.

Effect of plea of tender, see PLEADING, 10.

Of deed, see VENDOR AND PURCHASER, 6, 7.

Of payments by vendee, see VENDOR AND PURCHASER, 8, 10.

TENDER—CONTINUED.

1. TENDER—SUFFICIENCY. As the law does not concern itself with trifles, a tender of $400 interest on a mortgage note is sufficient, without adding interest thereon for three days intervening between its maturity and the date of tender. *Matzger v. Page*..... 170

2. TENDER—OBJECTIONS—ESTOPPEL. The refusal of a tender on the ground that it was not made in time, precludes the party from subsequently objecting that it was not sufficient in amount. *Gottschalk v. Meisenheimer* 299

TERMINATION:

Revocation of notice terminating tenancy, see LANDLORD AND TENANT, 2.

TIME:

For taking appeal, see APPEAL AND ERROR, 8.
Service of notice of application for guardian, see INSANE PERSONS.
Furnishing duplicate statement to owner of materials furnished contractor, see MECHANICS' LIENS, 5.
Tender of payment by vendee, see VENDOR AND PURCHASER, 10.

TITLE:

See EJECTMENT.
On transfer of bill or note, see BILLS AND NOTES, 7, 9, 10.
Fee of highway, see HIGHWAYS.
Statutes, see STATUTES, 1, 2.
Right of vendor to pass title through third person, see VENDOR AND PURCHASER, 1.
Actions affecting title to real property, see VENUE.

TORTS:

See ASSAULT AND BATTERY; FRAUD; LIBEL AND SLANDER; MALICIOUS PROSECUTION; NEGLIGENCE; NUISANCE; TROVER AND CONVERSION.
Assault on passenger by street car conductor, see CARRIERS, 6, 7.
Fraudulent purchase of corporate property at tax sale by officers of corporation, see CORPORATIONS, 2.
Of officers of city, see MUNICIPAL CORPORATIONS, 17.
Agents, see PRINCIPAL AND AGENT, 1, 2.

TRANSCRIPTS:

Cost of as necessary expense, see MALICIOUS PROSECUTION, 4.

TRANSFERS:

Over street railway lines, see STREET RAILROADS.

TRESPASS:

To the person, see ASSAULT AND BATTERY.
Enjoining trespass against rights of abutting owner in highway, see HIGHWAYS.

TRIAL:

Review of ruling as dependent on presentation of objection or exception in lower court, see APPEAL AND ERROR, 3-7.

Review of rulings as dependent on presentation of same by record, see APPEAL AND ERROR, 9-11.

Review of verdicts or findings, see APPEAL AND ERROR, 13-19.

Curing of errors or irregularities occurring at trial, see APPEAL AND ERROR, 25, 27-29.

Review of rulings as dependent on prejudicial nature of error, see APPEAL AND ERROR, 20-38.

Proceedings after remand, see APPEAL AND ERROR, 40-44.

Instructions in action for breach of contract of carriage, see CARRIERS, 5.

Instructions in action for assault by street car conductor, see CARRIERS, 6, 7.

Continuance in civil actions, see CONTINUANCE.

Directing verdict for plaintiff in action for breach of contract, see CONTRACTS, 5.

In criminal prosecutions, see CRIMINAL LAW.

Indorsement of name of new witness on information, see CRIMINAL LAW, 6.

Instructing as to lesser degree of offense, see HOMICIDE, 2, 3.

Right to trial by jury, see JURY.

For personal injuries, see MASTER AND SERVANT.

Of action for injuries to persons in city street, see MUNICIPAL CORPORATIONS, 17, 19-27.

Place of trial, see VENUE.

Examination and impeachment of witnesses, see WITNESSES.

1. TRIAL—MISCONDUCT OF COUNSEL—ARGUMENT. Upon objections to argument of counsel in stating that a certain fact was proved, the court discharges its duty in admonishing the jury that they must disregard the statements of counsel and be guided by their own recollection of the evidence. *Chicago, Milwaukee & Puget Sound R. Co. v. True* 646

2. TRIAL—MISCONDUCT OF JUDGE. It is within the province of the trial judge to make plain to the jury by suggestions to counsel matters that were left obscure, without being open to a charge of manifest partiality. *Edwards v. Seattle, Renton & Southern R. Co.*... 77

3. SAME. A tender by the judge of a pillow and blanket to attendants of an injured party is not an undue manifestation of sympathy in the presence of the jury. *Edwards v. Seattle, Renton & Southern R. Co.* 77

4. TRIAL—INSTRUCTIONS—ASSUMPTION OF FACTS. Where there was no question upon a certain fact, the court may assume it to be an established fact in the case, and instruct the jury without reference to any question thereon. *Carlisle Packing Co. v. Deming*..... 455

TRIAL—CONTINUED.

5. TRIAL—INSTRUCTIONS AS A WHOLE. Objection to particular instructions cannot be urged where the instructions as a whole fairly and correctly state the law of the case. *Myhra v. Chicago, Milwaukee & Puget Sound R. Co.* 1

6. TRIAL—INSTRUCTIONS—REQUESTS. It is not error to refuse a requested instruction covered in the general charge. *Edwards v. Seattle, Renton & Southern R. Co.* 77

7. TRIAL—INSTRUCTIONS—REQUESTS. It is not error to refuse to instruct in the language requested, when covered in the general charge. *Domke v. Gunning* 629

8. TRIAL—VERDICT—SPECIAL FINDING—DEFINITENESS. In an action by a passenger for an assault by a street car conductor, where an interrogatory was submitted as to whether plaintiff had alighted when first struck, an answer that he was on the car when first struck is not too indefinite. *Johnson v. Washington Water Power Co.* 619

TROVER AND CONVERSION:

1. TROVER AND CONVERSION—DAMAGES—MEASURE—TRUSTS—LIABILITY OF TRUSTEE. Where a trustee sells and dispossesses himself of property bid in by him and held in trust for another, he is guilty of a conversion, and the measure of damages is the market value of the goods at the time of the conversion, with interest, less the sum advanced by the trustee on the purchase price. *McSorley v. Bullock* 140

TRUSTS:

Creation of fiduciary relation giving right to accounting, see ACCOUNT.

Conversion by trustee, see TROVER AND CONVERSION.

1. TRUSTS—CONSTRUCTIVE TRUSTS—EVIDENCE—SUFFICIENCY. A constructive trust is shown, by clear and convincing testimony, although the evidence of the two parties in interest is in direct conflict, where it appears that the plaintiff was interested in a bankrupt corporation and applied to the defendant for an advance to enable him to bid for the assets at a receiver's sale, that the defendant consented, and stated to others in plaintiff's presence that he was bidding in the property for the plaintiff and that there was not time, and it was not necessary to draw up a contract, the plaintiff taking an active interest in the sale, the arrangement being that defendant was to take the bill of sale in his own name for security only, after which he repudiated the trust and converted and sold the property. *McSorley v. Bullock* 140

TRUSTS—CONTINUED.

2. SAME—FRAUDS, STATUTE OF—POSSESSION OF TRUST PROPERTY. The statute of frauds does not apply to an oral agreement to advance the money to bid in property at a sale and hold the same in trust for another, whereby a constructive trust is created, and it is immaterial who had possession of the property. *McSorley v. Bullock*..... 140

UNLAWFUL DETAINER:

Harmless error in refusal to quash writ of restitution, see APPEAL AND ERROR, 37.

USURY:

1. USURY—DISCOUNTING COMMERCIAL PAPER—BILLS AND NOTES—NEGOTIABILITY. The discounting of a "wheat" note obligating the maker to grow and deliver certain wheat, is not usurious, within Rem. & Bal. Code, § 6250, providing that the discounting of "commercial" paper, shall be considered as a loan within the usury laws; since it is not commercial paper, within Rem. & Bal. Code, §§ 3392, 3396, providing that an instrument to be negotiable must be payable in money without any promise to do any additional act. *Thomson v. Koch* 438

2. USURY—DISCOUNTING PAPER—LIABILITY OF BORROWER—STATUTES. The discounting of a note, which was originally free from the taint of usury, is not usurious where no recovery was sought against the assignee and he did not render himself liable thereon, within Rem. & Bal. Code, § 6250, providing that the discounting of commercial paper where the borrower makes himself liable as maker, guarantor, or indorser, shall be considered as a loan within the usury laws. *Thomson v. Koch*..... 438

3. USURY—DEFENSES—USURIOUS TRANSFERS. The usurious discounting of a note and mortgage is no defense to a suit by the transferee against the maker. *Thomson v. Koch*..... 438

VACATION:

See JUDGMENT, 1.
Of assessment of leasehold, see TAXATION, 2.
Of tax foreclosure, see TAXATION, 5-8.

VALUE:

Opinion of expert as to value of land, see EVIDENCE, 10, 11.
Of property stolen and acts constituting grand larceny, see LARCENY.
Recovering value of property, see REPLEVIN.

VARIANCE:

Between pleading and proof in criminal prosecution, see FALSE PRETENSES.
Between pleading and proof in civil action, see PLEADING, 12.

VENDOR AND PURCHASER:

Commission on sale of land by broker, see BROKERS.
Cancellation of option, see CANCELLATION OF INSTRUMENTS.
Election to rescind and rights as affected by subsequent forfeiture of contract, see EXCHANGE OF PROPERTY.
Requirements of statute of frauds, see FRAUDS, STATUTE OF, 1, 2.
Mortgagee as *bona fide* purchaser, see MORTGAGES, 1, 2.
Transfer of ownership of personal property, see SALES.
Specific performance of contract, see SPECIFIC PERFORMANCE.

1. VENDOR AND PURCHASER—CONTRACTS—AGREEMENT FOR WARRANTY—PASSING TITLE THROUGH THIRD PERSON. A vendor agreeing to execute or cause to be executed a good and sufficient warranty deed cannot convey or assign his rights to a third person, and compel the vendee to accept a warranty deed from such person; and it is immaterial that the legal title was held in trust for him by still another party at the time his contract of sale was made. *Gottschalk v. Meisenheimer* 299

2. VENDOR AND PURCHASER—RESCISSION BY VENDEE—FRAUD—FAILURE OF CONSIDERATION—EVIDENCE—SUFFICIENCY. There is sufficient evidence to warrant the rescission of an exchange of land for defendants' hotel, for fraud and partial failure of consideration, where it appears that the defendants greatly overstated the amount of the monthly receipts and removed a large amount of furniture included in the trade; an examination of the hotel not affecting plaintiffs' right to rescind for fraud as to the earnings. *Johnson v. Ryan* 60

3. VENDOR AND PURCHASER—RESCISSION BY VENDEE—WAIVER—DEEDS—CANCELLATION—FRAUD — EVIDENCE — SUFFICIENCY. Where vendees could not read or write the English language, and the vendor defrauded them by representing that $3,000 had been paid on the land contract assigned to them and misread the contract, the taking of possession and cutting the crop by the vendees does not waive their right to rescind, where they did not then know of the misrepresentations as to the $3,000 payment, and acted with diligence as soon as they learned thereof, offering to reassign the land contract and leave the land as they found it; even if their conduct amounted to a waiver of some of the misrepresentations. *Stelter v. Fowler*.. 345

4. VENDOR AND PURCHASER—RIGHTS OF VENDEE—WAIVER. The vendee waives rights under a contract to purchase land, where, on being notified that vendors could not obtain and convey the whole title, he proposed to purchase the vendors' interest at a price to be agreed upon and himself negotiate for the balance of the title. *Blakely v. Sumner* 206

5. VENDOR AND PURCHASER—FORFEITURE—ASSIGNEE OF VENDOR—CANCELLATION OF INSTRUMENTS—PARTIES ENTITLED. Where vendors contracted to sell property in consideration of an agreement by the vendee to pay a mortgage against other property of the vendors,

VENDOR AND PURCHASER—CONTINUED.

and after default by the vendee the vendors were compelled to make a payment on the mortgage, and subsequently conveyed their interest in the property subject to the contract of sale, "with all their rights thereunder and payments due," the assignees of the vendors are entitled to collect from the vendee the amount paid by the vendors on the mortgage, and may declare a forfeiture of the contract of sale after demand, notice, and default. *Lewis v. Bailey*..... 296

6. SAME — FORFEITURE — DEFAULTS — WAIVER — TENDER BY VENDOR. Where the vendor has allowed all the payments on a contract of sale to become past due, he cannot declare a forfeiture of the contract without tendering a deed and performance on his part. *Gottschalk v. Meisenheimer* 299

7. VENDOR AND PURCHASER—CONTRACTS—FORFEITURE—TENDER OF PERFORMANCE—MUTUAL AND DEPENDENT OBLIGATIONS. Under a contract for the conveyance of land making the last payment and delivery of the deed mutual, concurrent, and dependent obligations, the vendor cannot declare a forfeiture for default in the last payment without making demand and tender of a deed. *Lewis v. Wellard*..... 590

8. VENDOR AND PURCHASER—FORFEITURE—DEMAND—TENDER—AMOUNT DUE. Upon an alternative notice by a vendor asserting a default and requiring the vendee to pay in full or forfeiture would be declared, upon a tender of the full amount before forfeiture, the full amount becomes due *ipso facto*. *Gottschalk v. Meisenheimer*..... 299

9. VENDOR AND PURCHASER—RESCISSION BY VENDOR—FAILURE TO PERFORM—EVIDENCE—SUFFICIENCY. Upon a direct conflict in the evidence of the two parties as to whether plaintiff intended to give defendant a contract of sale, or only to list property for sale, a cancellation of a contract to sell is warranted where it appears that the defendant had paid nothing, had requested an extension of time, and had not offered to perform within the time required by the contract. *Donnelly v. Hobbs*..... 569

10. VENDOR AND PURCHASER—FORFEITURE—NOTICE—NECESSITY — TENDER OF PAYMENTS—TIME FOR. Where a vendee in default was given an alternative notice to pay up on or before a certain date or the contract "will be forfeited," a tender of all sums due, made before formal notice of forfeiture, although after the date fixed, is in time and entitles the vendee to performance on the part of the vendor. *Gottschalk v. Meisenheimer*..... 299

VENUE:

1. VENUE—TITLE TO REAL PROPERTY—USE AND OCCUPATION. An action under Rem. & Bal. Code, § 8805, for the recovery of reasonable rent from a tenant by sufferance, is not an action affecting the title to real property, within Id., § 204, laying the venue in the county where the same is situated, although the answer sets up title in the defendants and brings the title incidentally in issue. *Sheppard v. Coeur d'Alene Lumber Co*..... 12

VERDICT:

Objections to special findings for purpose of review, see APPEAL AND ERROR, 3.
Review on appeal, see APPEAL AND ERROR, 16-19.
As curing error in trial of cause, see APPEAL AND ERROR, 28.
Excessive damages for breach of contract of carriage, see CARRIERS, 4.
Impeachment of in criminal prosecutions, see CRIMINAL LAW, 10.
Inadequate or excessive damages, see DAMAGES, 3-6.
Specifying grade or degree of offense, see HOMICIDE, 4.

VERIFICATION:

Of information on oath of prosecuting attorney, see INDICTMENT AND INFORMATION, 1.

VICE PRINCIPALS:

See MASTER AND SERVANT, 8, 9, 13, 17.

VOTERS:

Submission of bond issue to vote, see MUNICIPAL CORPORATIONS, 28.

WAIVER:

Of option by payee to hasten maturity of note, see BILLS AND NOTES, 11.
Forfeiture of policy of insurance, see INSURANCE, 6.
Of tenant's right to bonus on termination of lease, see LANDLORD AND TENANT, 4.
Of objection to confirmation of assessment, see MUNICIPAL CORPORATIONS, 7.
Of objections, see PLEADING, 13.
Authority of agent to waive performance of terms of bond, see PRINCIPAL AND AGENT, 3.
By surety of provision in contract, see PRINCIPAL AND SURETY, 2.
Of objection to compliance with covenants of warranty by purchaser, see SALES, 6.
Of rights under contract for sale of land, see VENDOR AND PURCHASER, 3, 4, 6.

WARRANTS:

Mandamus to compel payment, see MANDAMUS.
State warrants, see STATES.

WARRANTY:

On sale of goods, see SALES, 3-6.
Right to compel vendee to accept warranty deed from third person, see VENDOR AND PURCHASER, 1.

WATERS AND WATER COURSES:

Right of abutting owner to maintain irrigating ditches in highway, see HIGHWAYS.

WATERS AND WATER COURSES—CONTINUED.

1. WATERS—IRRIGATION—CONTRACTS—BREACH—ACT OF GOD. Where an irrigation company contracted to irrigate certain lands from the natural flow of a stream, saving responsibility for shortage by the act of God, it is not excused from performing by unusually low water during certain seasons, where it had diverted part of the natural flow to supply a town with water. *Evans v. Prosser Falls Land and Power Co*..... 178

2. SAME—CONTRACTS—BREACH—SUPPLY — SALVAGE WATERS. Where an irrigation company is under contract to irrigate certain lands from the natural flow of a stream, waters seeping through the company's dam at the time of the contract cannot be treated as salvage waters and used for other purposes, on the construction of a new dam saving the waste waters, where the parties contracted for irrigation with reference to the natural flow of the stream. *Evans v. Prosser Falls Land and Power Co*..... 178

WAYS:

Private ways, see EASEMENTS.
Public ways, see HIGHWAYS.

WEAPONS:

Use of in assault, see ASSAULT AND BATTERY.

WILLS:

See EXECUTORS AND ADMINISTRATORS.
Orders in probate as final adjudication and construction of will, see JUDGMENT, 5-7.

1. WILLS—CONSTRUCTION—RULES—INTENT—AVOIDING INTESTACY. The rule of *ejusdem generis*, as applied to wills, yields to the rule that a will is to be construed to give effect to the intent of the testator, and to avoid intestacy, and when the circumstances show that it would defeat the intention; so that a clause in a will "and in fact all personal property," following a bequest of live stock, farm implements, household furniture and effects, bequeathed to one of the testator's daughters, is not to be restricted by the rule of *ejusdem generis*, but covers $6,245.30 cash handed to the daughter the day before his death, and not otherwise disposed of in the will, where the intent to will all of his property appears by bequests of $50 to each of certain other children, followed by a clause that in times past he had given them their portion of their inheritance, and the balance of the will showed careful attention to every detail of his parental duties and intent not to die intestate. *In re Lotzgesell's Estate* 352

2. WILLS—CONSTRUCTION — LEGACIES — DEBTS. Specific bequests of money are not to be included among "all other just debts" directed to be paid in a certain way, but are to be paid from cash on hand at the time of the testator's death, bequeathed under a residuary clause. *In re Lotzgesell's Estate*..... 352

WILLS—CONTINUED.

3. WILLS—SPECIFIC LEGACY—CREDIT ON NOTE—INTEREST. A legacy of one thousand dollars, to be credited on a note due from the legatee, is a specific legacy to be credited as of the date of the death of the deceased. *Martin v. Barger*..... 672

WITNESSES:

See DEPOSITIONS.
Statements of codefendant, see CRIMINAL LAW, 1.
Testimony of accomplices, see CRIMINAL LAW, 2.
Indorsement of names of on information, see CRIMINAL LAW, 6.
Allowing witness to give spectacular reproduction of fight before jury, see CRIMINAL LAW, 7.
Experts, see EVIDENCE, 9-11.
Privilege of, see TAXATION, 6.

1. WITNESSES—CROSS-EXAMINATION. It is not error to refuse to require a witness on cross-examination to answer a question the second time, after having fully answered. *Peacock v. Ratliff*..... 653

2. WITNESSES—PRIVILEGE—ATTORNEY AND CLIENT. An attorney is not privileged from disclosing by whom he was employed nor the terms of the employment. *Collins v. Hoffman*..... 278

3. SAME. Letters between an attorney and client are not privileged irrespective of the nature of the confidential disclosures. *Collins v. Hoffman* 278

4. WITNESSES—IMPEACHMENT—CRIMINAL LAW. In a criminal prosecution, where a witness for the state had testified that he did not know what the accused had said after the fight, it is prejudicial error for the state to attempt to impeach the witness by showing that he had made other statements to the prosecuting attorney; since it did not affect his credibility as to any affirmative statement made by him, and only had the effect to get before the jury the alleged declarations of a discredited witness. *State v. Catsampas*. 70

5. WITNESSES—CREDIBILITY. In an action for personal injuries, it is not error to allow witnesses who were hurt in the same accident to state whether they had been paid money in settlement of their claims, where the jury were instructed that it was relevant only as touching their interest in the case and the weight to be given their testimony. *Etheridge v. Gordon Construction Co*..... 256

WORK AND LABOR:

Liens for work and materials, see MECHANICS' LIENS.

1. WORK AND LABOR — GRATUITOUS SERVICES — PRESUMPTION — EVIDENCE. Where the deceased went to live with the plaintiff, taking the place of his sister as housekeeper, the presumption that mutual services rendered are a gratuity must be overcome by clear and convincing evidence of the initiatory contractual relation; and there

WORK AND LABOR—CONTINUED.

is not sufficient evidence to submit the issue to the jury where it appears that the parties had lived together, rendering mutual services for thirty years, without any claim or recognition of indebtedness during the entire period; and statements to third persons, ten and fifteen years after the relation commenced, that deceased "would pay him well" and had left all property to him, do not amount to a recognition of indebtedness. *Anderson v. Osborn*..... 400

2. WORK AND LABOR—ACTION FOR SERVICES—DEFENSES—PAYMENTS—BURDEN OF PROOF. In an action for services, where the plaintiffs received moneys and were in a trust relation to the defendants, and plaintiffs accounted for the moneys so received to the satisfaction of the jury, the burden of proving payments is not put upon defendants, where the verdict can be sustained under an instruction to the jury that in determining the amount paid they may take into consideration the amounts coming into the plaintiff's hands and not accounted for by her. *Alden v. Hanson*..... 284

3. WORK AND LABOR—CONTRACT—PLEADING AND PROOF—GENERAL DENIAL. In an action for services under a joint contract of employment, it is competent, under a general denial, to disprove the contract alleged by showing a different contract whereby the plaintiff was employed by only one of the defendants. *Kain v. Sylvester*. 151

4. WORK AND LABOR—CONTRACT—EVIDENCE—SUFFICIENCY. In an action for services on an alleged joint contract, the evidence supports findings that the plaintiff, a stockholder, was employed by a corporation alone, when he had been employed by it in the same capacity during two seasons and the other defendants merely acted in their official capacity as officers of the corporation. *Kain v. Sylvester*. 151

WRITINGS:

Parol evidence to vary or explain, see EVIDENCE, 4-7.

WRITS:

See INJUNCTION; MANDAMUS; PROCESS; PROHIBITION.

12/29/11